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In The

Supreme Court of the United States

October Term, 1994

THE JOHN G. AND MARIE STELLA KENEDY MEMORIAL FOUNDATION,

Petitioner,

vs.

GARRY MAURO, COMMISSIONER OF THE GENERAL LAND OFFICE, AND THE STATE OF TEXAS,

Respondents.

On Petition For A Writ Of Certiorari To The United States Court Of Appeals For The Fifth Circuit

BRIEF OF AMICUS CURIAE DUNN-McCAMPBELL ROYALTY INTEREST, INC. IN SUPPORT OF THE PETITION FOR A WRIT OF CERTIORARI

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BRIEF OF AMICUS CURIAE DUNN-McCAMPBELL ROYALTY INTEREST, INC. IN SUPPORT OF THE PETITION FOR A WRIT OF CERTIORARI

Amicus curiae Dunn-McCampbell Royalty Interest, Inc. respectfully submits this Brief in support of the Petition for a writ of certiorari filed by Petitioner The John G. and Marie Stella Kenedy Memorial Foundation in the above-entitled proceeding.

INTEREST OF AMICUS CURIAE

Amicus curiae Dunn-McCampbell Royalty Interest, Inc. ("Dunn-McCampbell") is a property owner in a situation

similar to that of Petitioner The John G. and Marie Stella Kenedy Memorial Foundation (the "Foundation"). Dunn-McCampbell owns mineral interests underlying Padre Island, which lies between the Gulf of Mexico and the Laguna Madre in south Texas. Dunn McCampbell's property is on the side of the Laguna Madre opposite the roughly 35,000 acres of littoral property (the "Disputed Land") that is at issue in this case.

Dunn-McCampbell is deeply concerned that its own mineral interests may be expropriated, and that it will have no redress. Respondents the State of Texas (the "State") and Garry Mauro ("Mauro"), in his official capacity as Commissioner of the General Land Office, have recently taken the position that, because of changes in the shoreline, the State now owns minerals belonging to Dunn-McCampbell. According to Respondents, the land beneath which these minerals lie is no longer fast land, but rather part of the State's submerged property. For obvious reasons, Dunn-McCampbell has difficulty entering into leases with third parties for the extraction of oil and gas so long as the State claims ownership of Dunn-McCampbell's littoral property.

Under the Fifth Circuit's decision in this case, the State could, if it chose, deny Dunn-McCampbell any remedy in its own courts. Texas has no analogue to the Quiet Title Act, 28 U.S.C. § 2409a, or to the Tucker Act, 28 U.S.C. §§ 1346, 1491. The best alternative would be a claim against Mauro in his official capacity in the nature of an equitable quiet title action under 42 U.S.C. § 1983. According to the Court of Appeals, however, such an action would not lie if the State has any sort of colorable claim to the littoral property.

Although Dunn-McCampbell has no direct financial stake in the outcome of this lawsuit, its interests are closely aligned with those of the Foundation. Accordingly, Dunn-McCampbell vigorously supports the Foundation's Petition for a writ of certiorari.[1]

SUMMARY OF ARGUMENT

In its Petition, the Foundation has already established that the Fifth Circuit's decision conflicts with the jurisprudence of this Court and of other Circuits in several respects. The Foundation, however, did not discuss the absence of an obvious and adequate state law remedy for a deprivation of property as a critical factor in a due process analysis.

Texas law does not provide the Foundation with any clearly available theory or forum by which to present its claims to the Disputed Land. The gist of the Fifth Circuit's holding, then, was that a state sovereign may "declare itself the proprietor of all landed estates and the heir of all its subjects" with impunity. C. DE SECONDAT, BARON DE MONTESQUIEU, DE L'ESPRIT DES LOIS, livre V, chap. 14 (original 1748), *reprinted in* 2 OEUVRES COMPLÈTES DE MONTESQUIEU at 294-95 (R. Caillois ed. 1951) (discussing the absence of security of property in despotic states). According to the Fifth Circuit, a state

[1] Both the Foundation and Respondents have consented to the filing of this Brief. Letters from the respective attorneys for the Foundation and Respondents expressing this consent have been submitted to the Clerk of this Court.

may bar the doors of its own courthouses by invoking sovereign immunity, and no federal action for declaratory and injunctive relief against the official controlling a citizen's property will lie if the state has a "colorable claim" to the property. In so ruling, the Fifth Circuit rendered a deeply disturbing decision that is contrary to the holdings of this Court.

Moreover, the Fifth Circuit held that the State itself is the "real" party in interest under the Foundation's § 1983 action. This means not only that federal courts lack jurisdiction, but also that the Foundation has failed to state a viable cause of action, because the State is not a "person" for purposes of 42 U.S.C. § 1983.

In reaching this conclusion, the Fifth Circuit stressed that the State has a "colorable claim" to the Disputed Land. The Foundation has pointed out that the "colorable claim" test was designed to assay whether a federal court may exercise *in rem* jurisdiction over property allegedly belonging to a state and in the possession of a state officer, not to determine whether a federal court may enter an *in personam* decree against the officer affecting the disposition of the property. This consideration, however, deserves greater elaboration.

There are many instances where basic principles of federalism and multiple sovereignty prevent a federal (or a state) court from exercising *in rem* jurisdiction. Nonetheless, a court that lacks *in rem* jurisdiction may still enter an *in personam* decree adjudicating rights in the *res*. By believing that the Foundation's § 1983 claim was – or even could be – an *in rem* action, and by analyzing the claim accordingly, the Fifth Circuit rendered a decision

that has a specious plausibility, and yet that is contrary to the most fundamental ideas of property rights and of federalism that this Court has espoused.

For these reasons, a writ of certiorari should issue, and this Court should review the decision of the Court of Appeals.

ARGUMENT IN SUPPORT OF GRANTING THE PETITION FOR A WRIT OF CERTIORARI

I. In holding that a private property owner may be denied any federal theory of liability or any federal forum by which to vindicate its constitutionally protected property rights against a state official who is wrongfully occupying the property under the state's claim of right, even though the private owner may have no state law theory or state forum by which to seek redress, the Fifth Circuit's ruling conflicts with decisions by this Court and by other Circuits.

For years, the Foundation has been seeking a forum and a legal theory by which to vindicate its claims to the Disputed Land. Respondents, however, have repeatedly invoked sovereign immunity in Texas courts and the Eleventh Amendment in federal courts in order to deny the Foundation any redress.

From the outset, Respondents argued that unless the Texas Legislature granted the Foundation permission to sue, the Foundation was not entitled to present its claims anywhere on any basis. (Appendix at pp. A-4-A-5, B-2-B-4). After the United States District Court for the Southern District of Texas had remanded the Foundation's state

law claims to the state court in Kenedy County, Respondents secured the dismissal of those claims on sovereign immunity grounds. (Appendix at pp. C-1-C-6, D-1). The Foundation has appealed that dismissal.

It was only well after the Foundation had appealed the dismissal of its action under 42 U.S.C. § 1983 to the Fifth Circuit that Respondents suggested *for the first time* that the Foundation could bring an action for declaratory relief against the State under Tex. Nat. Res. Code § 33.171 (Vernon 1993). (Appendix at pp. C-5-C-6, F-3-F-9). Revenues from submerged lands owned by the State of Texas are controlled by the School Land Board (the "Board"). Mauro, in his official capacity, chairs the Board. Tex. Nat. Res. Code § 33.171 permits a littoral landowner who has been adversely affected by the Board's actions to bring a declaratory judgment action against the State in a court in Travis County.

Not one reported case has been decided under this statute, even though it was enacted in 1973. Moreover, under Texas law, sovereign immunity is jurisdictional; Texas courts are required to examine their subject matter jurisdiction *sua sponte;* and statutory waivers of sovereign immunity are strictly construed. *See, e.g., Duhart v. State,* 610 S.W.2d 740, 742 (Tex. 1980); *Magnolia Petroleum Co. v. Walker,* 125 Tex. 430, 441, 83 S.W.2d 929, 934 (1935), *cert. denied,* 296 U.S. 623, 56 S. Ct. 144, 80 L. Ed. 442 (1935). It is not certain that the Board has taken any "action" within the meaning of Tex. Nat. Res. Code § 33.171 so as to permit a claim to be asserted under that statute.

Finally, while the Foundation's appeal was pending before the Fifth Circuit, several of the State's oil and gas lessees whose leaseholds included portions of the Disputed Land commenced an interpleader action in a state court in Travis County, naming the Foundation and Respondents as defendants. (Appendix at pp. G-1-G-13, H-1-H-9). The Foundation has cross-claimed against the State, reasserting its rights in the Disputed Land. (Appendix at pp. I-4-I-12). The State has not filed an answer to the cross-claim. It is uncertain whether the Foundation may be faced with yet another sovereign immunity bar. *See Department of Public Safety of Texas v. Great Southwest Warehouses, Inc.*, 352 S.W.2d 493, 494-95 (Tex. Civ. App. – Austin 1961, writ ref'd n.r.e.) (State of Texas may be sued only with its consent, and this can be given only by the Legislature; Attorney General has no authority to waive the State's sovereign immunity).

Respondents' refusal to allow the Foundation a forum stands in marked contrast to the State's use of changes in littoral boundaries to expand its own property. The Attorney General of Texas has argued successfully that shoreline boundaries are subject to relitigation because they are inherently subject to change. *Matcha v. Mattox*, 711 S.W.2d 95, 99-100 (Tex. App. – Austin 1986, writ ref'd n.r.e.), *cert. denied*, 481 U.S. 1084, 107 S. Ct. 1911, 95 L. Ed. 2d 517 (1987). When a shoreline has eroded or water levels have risen, the State has been quick to reap the benefit by resorting to its courts to secure the new additions to its submerged property. *City of Corpus Christi v. Davis*, 622 S.W.2d 640, 644-46 (Tex. Civ. App. – Austin 1981, writ ref'd n.r.e.); *see City of Port Isabel v. Missouri Pac. R. Co.*, 729 S.W.2d 939, 942-44 (Tex. App. –

Corpus Christi 1987, writ ref'd n.r.e.). When there is substantial evidence that the fast land has expanded, however, and that the State's submerged property has diminished accordingly, Respondents refuse to allow a littoral owner even to present its claims.

The Fifth Circuit was aware of the uncertainty as to whether any Texas forum or state law theory could be used to adjudicate the Foundation's rights. The Court of Appeals requested post-submission briefing on this issue. (Appendix at pp. E-3-E-9, F-2-F-9). Nonetheless, the Fifth Circuit affirmed the dismissal with prejudice of the Foundation's § 1983 claim.

This Court has long held that a state and its officers may not use a combination of state law sovereign immunity and the Eleventh Amendment to bar the doors of every courthouse. *General Oil Co. v. Crain*, 209 U.S. 211, 226-27, 28 S. Ct. 475, 480, 58 L. Ed. 754 (1908). Although the specific holding in *General Oil* was that a state could not close its own courts to federal claims for declaratory and injunctive relief against state officers, at a deeper level this Court was concerned with despotism. Federally guaranteed rights – including property rights – must have some forum for vindication. *Id.*, 209 U.S. at 226-27, 28 S. Ct. at 480. A state and its officials may not obscure the uncertainty of state law redress and at the same time stand on the Eleventh Amendment. *See Florida Dept. of State v. Treasure Salvors, Inc.*, 458 U.S. 670, 697, 102 S. Ct. 3304, 3321, 73 L. Ed. 2d 1057 (1982).

Conversely, this Court has held that if a sovereign does provide a clearly established procedure for relief when its officials retain private property under color of

the sovereign's claim of right, then the private owner has not necessarily been deprived of due process. In such a case, an action for prospective declaratory and injunctive relief against an official would not be essential to stave off despotism. *Larson v. Domestic & Foreign Service Corp.*, 337 U.S. 682, 696-98, 69 S. Ct. 1457, 1464-66, 93 L. Ed. 1628 (1949); *accord Malone v. Bowdoin*, 369 U.S. 643, 647-48, 82 S. Ct. 980, 983-84, 8 L. Ed. 2d 168 (1962).

Other Circuits have also considered the obvious availability of a state forum and remedy to be of critical importance. In *Toledo, Peoria & Western R. Co. v. State of Illinois, Dept. of Transp.*, 744 F.2d 1296 (7th Cir. 1984), *cert. denied*, 470 U.S. 1051, 105 S. Ct. 1751, 84 L. Ed. 2d 815 (1985) (upon which the Fifth Circuit purported to rely), the Seventh Circuit was deeply impressed that the State of Illinois provided a specialized body of law, and even a specialized tribunal – the Illinois Court of Claims – to redress any state deprivation of private property. *Id.* at 1299; *see id.* at 1297. Consequently, the court held that the claimant railroad had not been deprived of its property without due process, and that an action against state officials under § 1983 would not lie. *Id.* at 1299.

Here, by contrast, there is no certainty that any state tribunal or state law theory is open to the Foundation. Respondents have fought vigorously – and, thus far, successfully – to close the door of every courthouse to the Foundation. It was precisely this situation that a § 1983 action under the principles of *Ex parte Young*, 209 U.S. 123, 158-60, 28 S. Ct. 441, 453-54, 52 L. Ed. 714 (1908), and *United States v. Lee*, 106 U.S. (16 Otto) 196, 208-09, 1 S. Ct.

240, 250-51, 27 L. Ed. 141 (1882), was meant to redress. *See Malone*, 369 U.S. at 647-48, 82 S. Ct. at 983-84.[2]

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[2] The very reason that actions against *federal* officials under the principles of *United States v. Lee*, 106 U.S. (16 Otto) 196, 208-09, 1 S. Ct. 240, 250-51, 27 L. Ed. 141 (1882) are scarcely ever seen, is that federal law provides a claimant with an obvious and ready remedy. A citizen who believes that the federal government has expropriated his or her property may bring an action for just compensation under the Tucker Act, 28 U.S.C. §§ 1346, 1491. So long as a Tucker Act remedy is available, the claimant has not necessarily been deprived of due process, and any allegation that the claimant has been denied just compensation is unripe. *Larson v. Domestic & Foreign Service Corp.*, 337 U.S. 682, 696-705, 697 n.18, 69 S. Ct. 1457, 1464-69, 1465 n.18, 93 L. Ed. 1628 (1949); *accord Ruckelshaus v. Monsanto Co.*, 467 U.S. 986, 1016, 104 S. Ct. 2862, 2880, 81 L. Ed. 2d 815 (1984); *Ramirez de Arellano v. Weinberger*, 745 F.2d 1500, 1550, 1551-52 (D.C. Cir. 1984) (en banc) (Scalia, J., dissenting), *vacated on other grounds*, 471 U.S. 1113, 105 S. Ct. 2353, 86 L. Ed. 2d 255 (1985).

The Tucker Act waives the sovereign immunity of the United States only for purposes of money damages or just compensation, not for equitable relief. *See United States v. Testan*, 424 U.S. 392, 397-98, 96 S. Ct. 948, 952-53, 47 L. Ed. 2d 114 (1976); *United States v. Woodall*, 12 F.3d 791, 793 (8th Cir. 1993). In a case such as the present one, if *federal* officers were occupying the Disputed Land, the Foundation might seek to establish its title against the United States directly, and thus establish its right to possession, under the Quiet Title Act, 28 U.S.C § 2409a. Once again, an action against federal officials for declaratory and injunctive relief might be superfluous.

In this case, however, Texas law simply has no analogue either to the Tucker Act or the Quiet Title Act. Texas is thus unlike many other states, such as Illinois, that provide their own counterparts to these federal statutes. *Cf. Toledo, Peoria & Western R. Co. v. State of Illinois, Dept. of Transp.*, 744 F.2d 1296, 1297, 1299 (7th Cir. 1984), *cert. denied*, 470 U.S. 1051, 105 S. Ct. 1751, 84 L. Ed. 2d 815 (1985). Consequently, an action for declaratory and injunctive relief against Mauro is essential to safeguard the most

Even if there were an adequate state law remedy, this should not affect the viability of the Foundation's § 1983 claim. An exhaustion of state procedures is not a prerequisite to bringing an action under § 1983. *Patsy v. Board of Regents of Florida*, 457 U.S. 496, 500-01, 102 S. Ct. 2557, 2559-60, 73 L. Ed. 2d 172 (1982). Moreover, the provision of a state law remedy is truly relevant to a due process analysis only where the deprivation results from an official's random and unauthorized acts. Where, as here, a high state officer is carrying out considered state policy in depriving the claimant of a constitutionally protected right, a § 1983 action will lie, irrespective of the availability of any parallel state law cause of action. *Zinermon v. Burch*, 494 U.S. 113, 128-30, 138-39, 110 S. Ct. 975, 985, 990, 108 L. Ed. 2d 100 (1990); *accord, e.g., Keniston v. Roberts*, 717 F.2d 1295, 1301 (9th Cir. 1983).

The Fifth Circuit's decision, then, is contrary to the principles that this Court expounded in *General Oil Co. v. Crain* and that other Circuits have followed. A federal remedy must exist for the violation of a federal right. Otherwise, as this Court has long held, the door is open to arbitrary and despotic government. *Marbury v. Madison*, 5 U.S. (1 Cranch) 137, 163, 2 L. Ed. 60 (1803); *accord United States v. Woodall*, 12 F.3d 791, 793 (8th Cir. 1993) ("Judicial review is a fundamental safeguard against government agencies and public officials who wrongfully seize or hold a citizen's property."). By turning its back on this principle, the Fifth Circuit reached a decision that

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fundamental rights, which the State could otherwise flout with impunity. *See Woodall*, 12 F.3d at 793; *Ramirez de Arellano*, 745 F.2d at 1522-24 (majority opinion).

conflicts with the holdings of this Court and of other Circuits.

II. By ruling that a private landowner is barred from bringing an action for prospective declaratory and injunctive relief under 42 U.S.C. § 1983 against a state official who is occupying the landowner's property under color of the state's claim of right, the Fifth Circuit misapplied principles governing *in rem* actions to an equitable *in personam* action, and thereby rendered a decision that conflicts with the holdings of this Court and of other Circuits.

The Foundation seeks an adjudication of its title to the Disputed Land under its § 1983 action against Mauro. From this, the Fifth Circuit concluded that the Foundation's claim is for an adjudication of its title *as against the whole world. The John G. & Marie Stella Kenedy Mem. Found. v. Mauro*, 21 F.3d 667, 671 (5th Cir. 1994), *petition for cert. filed*, 63 U.S.L.W. 3296 (Sept. 27, 1994). This sort of relief may be obtained *only* in an *in rem* action. *Cadorette v. United States*, 988 F.2d 215, 223 (1st Cir. 1993) (per Breyer, C.J.); *accord Rounds v. Cloverport Foundry & Mach. Co.*, 237 U.S. 303, 306, 35 S. Ct. 596, 597, 59 L. Ed. 966 (1915). In an *in rem* action, the *res* itself is before the court as a party defendant; indeed, the court's jurisdiction and its power to adjudicate title as against the whole world depend on the presence of the *res* within the territorial limits of the court's authority. *United States v. One Lear Jet Aircraft*, 836 F.2d 1571, 1573 (11th Cir. 1988), *reh'g denied*, 842 F.2d 339 (11th Cir. 1988), *cert. denied*, 487 U.S. 1204, 108 S. Ct. 2844, 101 L. Ed. 2d 881 (1988); *accord Pennington v. Fourth Nat'l*

Bank of Cincinnati, Ohio, 243 U.S. 269, 271-72, 37 S. Ct. 282, 283, 61 L. Ed. 713 (1917).

It is surprising that the Fifth Circuit would have characterized the Foundation's claim for declaratory and equitable relief in *in rem* terms. It is difficult to imagine that a *res* could be a "person" within the meaning of § 1983, or that a *res* could violate a party's federally guaranteed rights. The very few lower courts that have even had occasion to consider the matter have all held that § 1983 actions against state officials are necessarily *in personam*. *Dubuc v. Green Oak Tp.*, 810 F. Supp. 867, 870 (E.D. Mich. 1992); *Jordan Patterson Post v. Chaffee*, 103 F.R.D. 523, 524-25 (D. Kan. 1984); *Gilbert v. School Dist. No. 50, Adams Cty.*, 485 F. Supp. 505, 507 (D. Colo. 1980).

The Foundation seeks prospective injunctive relief against Mauro. Equity acts only *in personam* and never *in rem*, even when rights to property are at issue. *Massie v. Watts*, 10 U.S. (6 Cranch) 148, 158-60, 3 L. Ed. 141 (1810) (per Marshall, C.J.); *accord LaVarre v. Hall*, 42 F.2d 65, 67 (5th Cir. 1930). The Foundation's claim is in the nature of an equitable quiet title action. Unlike a true *in rem* proceeding, a quiet title adjudication is binding only on the parties and their privies; it does not purport to establish title as against the whole world. *Cadorette*, 988 F.2d at 223 (per Breyer, C.J.); *accord Nevada v. United States*, 463 U.S. 110, 143-44, 103 S. Ct. 2906, 2924-25, 77 L. Ed. 2d 509 (1983).

Under the fiction of *Ex parte Young*, 209 U.S. at 158-60, 28 S. Ct. at 453-54, the State itself would not be a party to the Foundation's § 1983 action against Mauro,

and neither would the State be in privity with Mauro. Accordingly, the State would not be bound by an adjudication that the Foundation holds title to the Disputed Land. The action would be purely *in personam* and not *in rem*. *See United States v. Contents of Accounts No. 3034504504 & 144-07143*, 971 F.2d 974, 984 (3d Cir. 1992), *cert. denied*, ___ U.S. ___, 113 S. Ct. 1580, 123 L. Ed. 2d 148 (1993).

Having confused the very nature of the Foundation's § 1983 claim, the Fifth Circuit proceeded to employ a test drawn from the plurality opinion in *Treasure Salvors* that is applicable only to *in rem* proceedings. A central question in *Treasure Salvors* was whether a federal court could exercise *in rem* admiralty jurisdiction over property held by state officials under color of the state's claim of ownership. A federal court's assumption of *in rem* jurisdiction over assets legitimately under the control of a state agency is equivalent to expropriating state property. The very exercise of such jurisdiction amounts to an action against the state itself. *In re New York (II)*, 256 U.S. 503, 510-11, 41 S. Ct. 592, 593, 65 L. Ed. 1063 (1921). The *Treasure Salvors* plurality determined, however, that the state officials had no colorable claim to control the property under any pretext of the state's title, and hence that the district court had properly arrested the property in order to establish its *in rem* jurisdiction. *Treasure Salvors*, 458 U.S. at 694, 696, 699-700, 102 S. Ct. at 3319, 3320, 3322.

From this, the Fifth Circuit concluded that, because the State has a colorable claim to the Disputed Land, and because Mauro is authorized to control the State's submerged property, any action adjudicating title as against Mauro would be an action against the State itself. *Kenedy*

Mem. Found., 21 F.3d at 671-72. This application to an *in personam* action of a test designed to assay the validity of an *in rem* arrest warrant is contrary to the jurisprudence of this Court and of other Circuits.

For example, a federal court may not exercise *in rem* jurisdiction over any property that is already under the *in rem* jurisdiction of a state court, *Kline v. Burke Constr. Co.*, 260 U.S. 226, 229-32, 43 S. Ct. 79, 81-82, 67 L. Ed. 226 (1922), even though parallel *in personam* actions over the same subject matter may proceed simultaneously in federal and state courts. *Donovan v. City of Dallas*, 377 U.S. 408, 412, 84 S. Ct. 1579, 1582, 12 L. Ed. 2d 409 (1964). This is because a court's seizure of property under the control of an instrumentality of another sovereign is necessarily an affront to the bedrock federalism principle of concurrent sovereignty. *See Princess Lida of Thurn & Taxis v. Thompson*, 305 U.S. 456, 466-67, 59 S. Ct. 275, 280-81, 83 L. Ed. 285 (1939).

In this connection, however, a federal court could entertain an *in personam* action to cancel a deed or to quiet title even if a similar action were pending in a state court, or indeed if the disputed property were under the *in rem* jurisdiction of a state court. *Miller v. Miller*, 423 F.2d 145, 147 (10th Cir. 1970). Certainly a § 1983 action, which is *in personam*, may be brought in a federal court, even if the *res* at issue is under the control of a state tribunal. *Dubuc*, 810 F. Supp. at 870. An exercise of *in*

personam jurisdiction over a state official is not tantamount to taking property from a state instrumentality *pendente lite* or making the state itself a party.[3]

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[3] The interplay between concurrent or multiple sovereignty and the *in rem/in personam* dichotomy is evident in the relations among courts in different states as well as between federal and state courts. A court in state A may not assume *in rem* jurisdiction over property located in state B and enter a judgment directly affecting title. The *res* is not within the jurisdiction of state A, and any such judgment would violate the sovereignty of state B. *E.g., In re Estate of Reed*, 233 Kan. 531, 538-39, 664 P.2d 824, 830-31 (1983), *appeal dismissed & cert. denied*, 464 U.S. 978, 104 S. Ct. 417, 78 L. Ed. 2d 354 (1983); *Worcester North Sav. Ass'n v. Sommerville Milling Co.*, 101 N.H. 307, 308-09, 141 A.2d 885, 886 (1958), *appeal dismissed & cert. denied*, 358 U.S. 278, 79 S. Ct. 313, 3 L. Ed. 2d 298 (1959); *Deaton v. Vise*, 186 Tenn. 364, 376, 210 S.W.2d 665, 670 (1948). On the other hand, a court in state A may enter an equitable *in personam* decree ordering a party to transfer (or not to transfer) property located in state B. Such a decree is not *in rem* and in no way violates the sovereignty of state B. *Massie v. Watts*, 10 U.S. (6 Cranch) 148, 158-60, 3 L. Ed. 181 (1810); *Smith v. Mitchell*, 394 S.W.2d 308, 309-10 (Mo. 1965); *Donaldson v. Greenwood*, 40 Wash. 2d 238, 250-51, 242 P.2d 1038, 1045-46 (1952).

Similarly, neither a state nor a federal court has any jurisdiction or right to violate the sovereignty of a foreign nation by entering an *in rem* judgment purporting to adjudicate title to property located in that nation as against the whole world. Nonetheless, a state or federal court may enter an *in personam* order directing a party before the court how to dispose (or not to dispose) of his or her interest in property located in another country. *Republic of the Philippines v. Marcos*, 862 F.2d 1355, 1364 (9th Cir. 1988), *cert. denied*, 490 U.S. 1035, 109 S. Ct. 1933, 104 L. Ed. 2d 404 (1989); *Matarese v. Calise*, 111 R.I. 551, 562, 305 A.2d 112, 118-19 (1973).

Just so, a federal court may not exercise *in rem* jurisdiction over property controlled by a state official under the state's

Similarly, federal courts have no jurisdiction to entertain an *in rem* probate proceeding. *Sutton v. English*, 246 U.S. 199, 205, 38 S. Ct. 254, 256, 62 L. Ed. 664 (1918); *In re Broderick's Will*, 88 U.S. (21 Wall.) 503, 509, 22 L. Ed. 599 (1874). By the same token, a federal court may not assume *in rem* jurisdiction over any property that is part of a probate estate. This would amount to a violation of the state's sovereignty by seizing property under the control of a state instrumentality. *Lamberg v. Callahan*, 455 F.2d 1213, 1216 (2d Cir. 1972). Nonetheless, a federal court may enter an *in personam* judgment against an executor or administrator in his or her capacity as the personal representative of an estate, and the judgment may have an enormous effect on the distribution of the probate *res*. *Waterman v. Canal-Louisiana Bank & Trust Co.*, 215 U.S. 33, 43-44, 30 S. Ct. 10, 12, 54 L. Ed. 80 (1909); *Lamberg*, 455 F.2d at 1216.

On the same principle, when assets are under the administration of a state official, such as a banking or insurance commissioner acting as a liquidator or receiver, a federal court may not exercise *in rem* jurisdiction over that property. To do so would, in effect, amount to haling the state itself before the federal tribunal. On the other hand, a federal court certainly may enter an *in personam* decree against the official, and the decree may have a great impact on the disposition of the *res*. *Vacuum Oil Co.*

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colorable claim of right. Nevertheless, a federal court may enter an equitable *in personam* decree against that official concerning the disposition of the disputed property. The Fifth Circuit never understood these elementary principles involving different types of jurisdiction and the rights of different sovereigns.

v. Land Title Guar. & Trust Co., 80 F.2d 476, 477-78 (6th Cir. 1935).

Here, by applying the colorable claim test expounded in *Treasure Salvors*, the Fifth Circuit established conclusively that a federal court may not exercise *in rem* jurisdiction over the Disputed Land. This has no more relevance to the Foundation's § 1983 action, however, than does the double nexus test, the fellow servant doctrine, or the Rule in Mountjoy's Case. The teachings of this Court and the holdings of other Circuits show that, no matter how colorable a state's claim to property may be, an *in personam* action in the nature of an equitable proceeding to quiet title is well laid under 42 U.S.C. § 1983 against the state-appointed official who administers the *res*. The Fifth Circuit set itself in conflict with these holdings by confusing *in rem* and *in personam* actions. In no sense can the § 1983 action against Mauro be viewed as equivalent to an action against the State.

CONCLUSION

The Fifth Circuit's holding stands for the proposition that if a state has any non-frivolous claim to property, then a private party with a strong claim to ownership of that property may be denied every avenue for relief. According to the Fifth Circuit, the state could bar any state law action by invoking sovereign immunity, and a § 1983 action against a state official would not lie because the state itself would be the "real" party in interest if it had a colorable claim to the *res*. This holding could easily misguide lower federal courts and state courts as well. It

runs counter to decisions by this Court and by other Circuits and opens the door to despotism. Therefore, a writ of certiorari should issue to review the ruling of the Court of Appeals.

Respectfully submitted,

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Filed February 16, 1991

IN THE UNITED STATES DISTRICT COURT
FOR THE SOUTHERN DISTRICT OF TEXAS
CORPUS CHRISTI DIVISION

THE JOHN G. AND MARIE STELLA KENEDY MEMORIAL FOUNDATION, Plaintiff,	§	
VS.	§	CIVIL ACTION NO. C-90-36
GARRY MAURO, COMMISSIONER OF THE GENERAL LAND OFFICE, and THE STATE OF TEXAS, Defendants.	§	

STATE OF TEXAS' MOTION FOR SUMMARY JUDGMENT AND SUPPORTING BRIEF

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* * *

ARGUMENT AND AUTHORITIES

* * *

C. Plaintiff's state-law theories of recovery against Commissioner Mauro are barred by sovereign immunity.

In an attempt to avoid the bar of sovereign immunity, Plaintiff seeks in its state-law claims against commissioner Mauro to acquire title to the Disputed Land on the theory that the commissioner's assertion of state ownership constitutes a cloud on Plaintiff's title. Plaintiff seeks against the Commissioner a declaratory judgment that the eastern boundary of its upland grants is the Intracoastal Waterway. Plaintiff relies on *State v. Lain*, 162 Tex. 549, 349 S.W.2d 579 (1961), as authority to maintain this action against the Commissioner.[46] Such reliance is misplaced.

State v. Lain was a suit to recover possession, not to acquire title, to property. Three factors critical to the Court's holding in *State v. Lain* distinguish that case from the case at bar: 1) the State was not a party to the litigation, 2) the State expressly disclaimed any title to the property at issue, and 3) the plaintiffs held record title to the land in dispute. As evidenced by the pleadings filed by Plaintiff itself in the present case, each of these critical factors is missing here. The State is a party. More importantly, the State claims, and has always claimed, title to the Disputed Land. Finally, Plaintiff does not have record title to the Disputed Land. As shown in *Sun v. Humble*, record title to the Laguna Madre, including the Disputed Land, has been in the State of Texas since 1845 and was in

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[46] Ex. A, p. 9, ¶ 16.

the Republic from 1836-45. 191 F.2d at 716. The eastern boundaries of the Big and Little Barretas were fixed in *Sun v. Humble* so that they "at no place conflict with the west lines of the state sections in Laguna Madre, as located by the State and delineated on a map in the General Land office." *Id.* ***Commissioner Mauro's plea to the jurisdiction with respect to the state-law claims asserted against him should be sustained. The Commissioner claims ownership of the Disputed Land only as the representative of the sovereign. Plaintiff's attempt to adjudicate the State's title to the property, even though brought against a state officer, is a suit against the State and, as Plaintiff concedes in its original Petition, Plaintiff has failed to obtain legislative authority to sue the State. Absent such authority, Plaintiff's claims are barred by sovereign immunity.*** *See State v. Isbell,* 127 Tex. 399, 94 S.W.2d 423 (Tex. Comm'n App. 1936, opinion adopted); *Bagg v. University of Texas Medical Branch at Galveston,* 726 S.W.2d 582, 584-86 (Tex. App. – Houston [14th Dist.] 1987, writ ref'd n.r.e.).

* * *

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* Emphasis added for purposes of this Appendix.

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IN THE UNITED STATES DISTRICT COURT
FOR THE SOUTHERN DISTRICT OF TEXAS
CORPUS CHRISTI DIVISION

KENEDY MEMORIAL FOUNDATION,	)	CIVIL ACTION
PLAINTIFF,	)	CA-C-90-36
VS.	)	CORPUS CHRISTI, TEXAS
GARRY MAURO, COMMISSIONER OF THE GENERAL LAND OFFICE,	)	OCTOBER 11, 1991
DEFENDANT.	)	

HEARING ON MOTIONS FOR SUMMARY JUDGMENT

BEFORE THE HONORABLE HAYDEN
W. HEAD, JR., JUDGE
UNITED STATES DISTRICT COURT
SOUTHERN DISTRICT

APPEARANCES FOR:

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THE COURT RECORDER: MS. J. F. ALVAREZ

PROCEEDINGS RECORDED BY
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* * *

[p. 19] be theirs. They don't have a takings claim until they have established title to it and they can't establish title to it unless they can force Commissioner Mauro through their 1983 action or under their *State* versus *Lane* theory, which we also submit is impermissible, to move that boundary so that it becomes their land in effect. That's what they're seeking. And we submit that that is analogous to an award of property to these plaintiffs. This is a case where the State is claiming title, we consider this to be our property, to have Always been our property since the 1800's, and that type of injunctive, what they want to call prospective relief, is in effect taking property from the State and awarding it to the plaintiff.

THE COURT: What alternatives does the plaintiff have to suit here to achieve that goal?

MS. KEENEY: Your Honor, we submit they do not have a right to bring a boundary dispute to move the

boundary without consent of the legislature. They cannot bring it –*

THE COURT: So any time the State wants to claim property, they're immune from suit?

MS. KEENEY: Your Honor, I think that there would be A very different situation if the State were in the position of say going in and actively seeking to acquire something that it has not held since the inception of the grant. This particular area has always been regarded –

[p. 20] THE COURT: So what's the answer to my question? My question was that they had no claim, I mean you said that the State has no courthouse, that you must receive permission of the State of Texas to sue on a land claim. And at that point I said does that mean they can never sue? And you began to say, give me some different, some different facts. Now, I want, I suppose, let's keep, you told me they can't sue here, ever, and I said can anybody sue the State on a title claim without permission of the legislature. What's my answer?

MS. KEENEY: Your Honor, if the State is claiming title, I don't think that an individual can bring a lawsuit against the State without consent of the legislature.

THE COURT: So without regard to the change of circumstances that might exist along the coast of Texas, that once the State of Texas claims it and if the facts change and if the Supreme Court of the State of

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* Emphasis added for purposes of this Appendix.

Texas says, well, the boundary line has been defined improperly by previous adjudications, that that's it, that the State gets to keep the land?

MS. KEENEY: Unless consent is obtained, yes.*

THE COURT: Well, that doesn't seem to have very much procedural due process in it.

MS. KEENEY: Well, Your Honor, under the, under *State* versus *Lane* and under various Supreme Court decisions, and I'd brought another one here to discuss that, that basically that is what the result is. This is not a situation where the [p. 21] State goes in and actively tries to take something away, it is basically holding on to property it has always held. And that that remains, there is no taking, just remains State property unless the boundary is moved, and they're not entitled to bring an action to try to move that boundary.

* * *

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* Emphasis added for purposes of this Appendix.

C-1

Filed June 8, 1993

NO. 490

THE JOHN G. AND MARIE STELLA KENEDY MEMORIAL FOUNDATION,	§	IN THE
	§	DISTRICT
	§	COURT
Plaintiff,	§	
	§	
VS.	§	OF KENEDY
	§	COUNTY, TEXAS
GARRY MAURO, COMMISSIONER OF THE GENERAL LAND OFFICE, and THE STATE OF TEXAS,	§	
	§	
	§	105TH JUDICIAL
	§	DISTRICT
Defendants.	§	

DEFENDANTS' BRIEF IN SUPPORT OF THEIR PLEA TO THE JURISDICTION AND SPECIAL EXCEPTIONS

TO THE HONORABLE JUDGE OF THE COURT:

The State of Texas and Garry Mauro, Commissioner of the General Land Office, Defendants herein, file this their Brief in Support of Their Plea to the Jurisdiction and Special Exceptions and show the Court as follows:

A. The doctrine of sovereign immunity bars Plaintiff's action against the Commissioner and its action against the State.

The accepted rule in Texas, as well as throughout the United States, is that the State has governmental immunity from suit and liability. *State v. Hale*, 136 Tex. 29, 146 S.W.2d 731, 735 (1941); *Hosner v. DeYoung*, 1 Tex. 764, 769

(1847). Further, a suit against an agency of the State is, in effect, a suit against the State, and therefore the doctrine of governmental immunity applies to a State agency. *Lowe v. Texas Tech Univ.*, 540 S.W.2d 297, 298 (Tex. 1976); *Department of Public Safety v. Great Southwest Warehouses, Inc.*, 352 S.W.2d 493, 494 (Tex. Civ. App. – Austin 1961, writ ref'd n.r.e.). *See also*, Greenhill & Murto, *Governmental Immunity*, 49 **Texas L. Rev.** 462 (1971). Similarly, a suit against a state official in his official capacity, wherein the plaintiff seeks to impose liability on the State, is barred by the doctrine of sovereign immunity. *W.H. Haden Co. v. Dodgen*, 158 Tex. 74, 308 S.W.2d 838, 840 (1958); *Herring v. Houston Nat'l Exch. Bank*, 113 Tex. 264, 253 S.W. 813, 814 (1923).

The State may not be sued without its consent, and consent may be obtained only through action of the Legislature, either by general law or by resolution or bill in specific instances. *Griffin v. Hawn*, 161 Tex. 422, 341 S.W.2d 151, 152 (1960); *State v. Isbell*, 127 Tex. 399, 94 S.W.2d 423, 424 (1936). Only the Legislature can waive the right of the State to immunity from suit; neither the executive nor judicial branches of the State government may exercise such a power. TEX. CONST. art. II, § 1; *Prairie View A & M Univ. v. Thomas*, 684 S.W.2d 169, 170 (Tex. App.-Houston [14th Dist.] 1984, writ refd n.r.e.). *See also* TEX. GOV'T CODE § 402.004 ("An admission, agreement, or waiver made by the attorney general in an action or suit to which the state is a party does not prejudice the rights of the state.").

In order for the Legislature to waive the sovereign immunity of the State or a State agency, it must do so by clear and unambiguous language. *Duhart v. State*, 610

S.W.2d 740, 742 (Tex. 1980). Such a waiver cannot be inferred or "effected by implication but must be expressly waived." *City of Houston v. Arney*, 680 S.W.2d 867, 875 (Tex. App. – Houston [lst Dist.] 1984, no writ). "Absent an explicit and unequivocal grant of a right or privilege by the State, any ambiguity or obscurity in the terms of a statute must operate in favor of the State." *City of Corpus Christi v. Acme Mechanical Contractors, Inc.*, 736 S.W.2d 894, 906 (Tex. App. – Corpus Christi 1987, writ denied). The Texas Supreme Court recently reaffirmed this principle in *Mount Pleasant I.S.D. v. Lindburg*, 766 S.W.2d 208, 211 (Tex. 1989) ("Only when the Legislature has clearly and explicitly waived the State's sovereign immunity may a cause of action accrue.").

Plaintiffs must allege and prove consent in an action against the State. *Walsh v. University of Texas*, 169 S.W.2d 993, 994 (Tex. Civ. App. – El Paso 1942, writ refd); *Contran Corp. v. Bullock*, 567 S.W.2d 616, 617 (Tex. Civ. App. – Austin 1978, no writ). The court is without jurisdiction to hear the case if there is a failure to allege and prove consent to sue the State. *Walsh*, 169 S.W.2d at 994. The appropriate and proper action on the Plea to the Jurisdiction is dismissal of the suit. *Texas Highway Dept. v. Jarrell*, 418 S.W.2d 486, 488 (Tex. 1967); *State v. Executive Condominiums, Inc.*, 673 S.W.2d 330, 332 (Tex. App. – Corpus Christi 1984, writ ref'd n.r.e.).

Plaintiff seeks a declaratory judgment against the Commissioner that the eastern boundary of its upland grants is the Intracoastal Waterway. Plaintiff relies on *State v. Lain*, 162 Tex. 549, 349 S.W.2d 579 (1961), as authority to maintain this action against the Commissioner. *See* Plaintiffs First Amended Original Petition, p.

9. Such reliance is misplaced. *State v. Lain* was a suit to recover possession, not to acquire title to property. Three factors critical to the Court's holding in *State v. Lain* distinguish that case from the case at bar: 1) the State was not a party to the litigation, 2) the State expressly disclaimed any title to the property at issue, and 3) the plaintiffs held record title to the land in dispute. As evidenced by the pleadings filed by Plaintiff in the present case, each of these critical factors is missing. The State is a party. More importantly, the State claims, and has always claimed, title to the Disputed Land. Finally, Plaintiff's own pleadings show that it does not have record title to the Disputed Land, which has always been recognized as the property of the State. Commissioner Mauro's plea to the jurisdiction with respect to the state-law claims asserted against him should be sustained. The Commissioner claims ownership of the Disputed Land only as the representative of the sovereign. Plaintiffs attempt to adjudicate the State's title to the property, even though brought against a state officer, is a suit against the State and, as Plaintiff concedes in its First Amended Original Petition, Plaintiff has failed to obtain legislative authority to sue the State. Absent such authority, Plaintiff's claims are barred by sovereign immunity. *See Isbell*, 94 S.W.2d at 423. *Bagg v. Univ. of Texas Medical Branch at Galveston*, 726 S.W.2d 582, 584-86 (Tex. App. - Houston [14th Dist.] 1987, writ ref'd n.r.e.). The reasoning in *State v. Executive Condominiums, Inc.*, is controlling here:

> By seeking to wrest ownership from the ministerial representative of the sovereign, appellee is attempting to expand and interfere with the authorized duties of the Commissioner. Thus, this action "is a suit to control the action of the

> State . . . and is therefore in effect a suit against the State, which cannot be maintained, the State not having consented to be sued." (citations omitted)

673 S.W.2d at 333.

Plaintiff's claims of an unlawful taking are barred for all the reasons set forth above. Such claims are predicated on Plaintiff establishing title to the Disputed Land. Unless and until Plaintiff establishes title to the Disputed Land, or some color of title, no takings claim is stated. Plaintiff clearly cannot bring an action to establish boundary and title without legislative consent and it presents no basis for legislative consent in its First Amended Original Petition. A boundary action is maintainable against the State, but Plaintiff has failed and refused to proceed under the appropriate statutory authority. Plaintiff, as well as any other littoral owner of land abutting coastal public land, has a remedy to resolve a legitimate boundary dispute with the State. Section 33.060 of the Texas Natural Resources Code imposes on the State's School Land Board the right "to locate and have marked on the ground the boundaries separating coastal public land from other land." TEX. NAT. RES. CODE § 33.060. Commissioner Mauro, who is Chairman of that Board, has general authority to implement the Board's decisions on the locations of those boundaries. TEX. NAT. RES. CODE §§ 31.051, 32.014. Under § 33.171 of the Natural Resources Code, a littoral owner whose rights "may be affected by any action of the board under [Chapter 33] may bring suit for a declaratory judgment against the State of Texas in a district court in Travis County to try the issues." TEX. NAT. RES. CODE § 33.171.

As this Court is well aware, counsel for Plaintiff is on record in this case stating affirmatively that Plaintiff is not proceeding under that statute. Therefore, Plaintiffs claims asserted herein are barred in their entirety.

B. Plaintiff's federal claims are not subject to the Jurisdiction of this Court.

Plaintiffs own pleadings acknowledge that its federal claims are pending in the Fifth Circuit. Plaintiff's federal claims rest in the federal court by virtue of Defendants' removal of this action to federal court. It is well established that removal of a case from state court to federal court ends the power of the state court to act upon the matters removed. *National Steam-Ship Co. v. Tugman*, 106 U.S. (16 Otto) 118, 1 S. Ct. 58, 27 L.Ed. 87 (1882); *E.D. Systems Corp. v. Southwestern Bell Tel. Co.*, 674 F.2d 453, 457 (5th Cir. 1982). The state court's jurisdiction over the federal claims has never been restored by the federal court – only the state law claims were remanded to state court. Therefore, this Court has no jurisdiction to proceed on the federal claims, and Plaintiff's pleadings of those matters should be ordered stricken. *See E.D. Systems*, 674 F.2d at 458; *Adair Pipeline Co. v. Pipeliners Local Union No. 798*, 325 F.2d 206 (5th Cir. 1963).

C. Plaintiff has no valid basis for recovery of attorney's fees.

Plaintiff seeks recovery of attorney's fees on the basis of 42 U.S.C. § 1988 and the Texas Declaratory Judgment Act found in Section 37.009 of the Texas Civil Practices &

Remedies Code. Plaintiff's federal basis for recovery of attorney's fees is barred for the reasons previously set forth regarding the federal court's jurisdiction of the federal claims. It is well established that Section 37.009 does not constitute a waiver of immunity from attorney's fees. *Waugh v. City of Dallas*, 814 S.W.2d 492, 496-97 (Tex. App. – Dallas 1991, writ denied). Attorney's fees are not recoverable unless provided for by statute or contract between the parties. *New Amsterdam Casualty Co. v. Texas Indus., Inc.*, 414 S.W.2d 914, 915 (Tex. 1967). Plaintiff has neither a statutory basis nor a contract providing for recovery of attorney's fees. Therefore, Plaintiff's pleadings seeking recovery of attorney's fees should be stricken.

D. Plaintiff has no basis for recovery of damages.

Plaintiff seeks recovery of damages in the instant suit based on its takings claims. As set forth previously, Plaintiff has stated no valid takings claims because title to the Disputed Land is and has always been held by the State. Plaintiff sets forth no proper consent to suit for damages and no statutory mechanism for their payment. Therefore, Plaintiff's action for damages is barred. *Perry v. Texas A & I Univ.*, 737 S.W.2d 106 (Tex.App. – Corpus Christi 1987, writ refd n.r.e.).

WHEREFORE, PREMISES CONSIDERED, Defendants respectfully pray that Plaintiff's action be dismissed and, alternatively, that Defendants' special exceptions be sustained and that Plaintiff recover nothing by its action and for such other and further relief both at

law and in equity, to which the Defendants may show themselves entitled.

Respectfully submitted,
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D-1

Filed July 26, 1993

NO. 490

THE JOHN G. AND MARIE STELLA KENEDY MEMORIAL FOUNDATION, Plaintiff,	§	IN THE DISTRICT COURT
VS.	§	OF KENEDY
GARRY MAURO, COMMISSIONER OF THE GENERAL LAND OFFICE, and THE STATE OF TEXAS, Defendants.	§	COUNTY, TEXAS
	§	105TH JUDICIAL DISTRICT

ORDER

On the 11th day of June, 1993, came on to be heard the Special Exceptions and Plea to the Jurisdiction filed by Garry Mauro, Commissioner of the General Land Office, and the State of Texas, Defendants in the above-styled and numbered cause. This Court, having considered the pleadings and the argument of counsel, is of the opinion and finds that the Special Exceptions and Plea to the Jurisdiction should be and hereby are sustained. Because of the disposition of the jurisdictional plea, it is not necessary for Plaintiff to replead.

IT IS, THEREFORE, ORDERED, that Plaintiff's action be and hereby is dismissed in its entirety for want of jurisdiction.

SIGNED this 22nd day of July, 1993.

/s/ J. Manuel Banales
J. Manuel Banales
Judge, 105th District Court

NO. 92-7714

IN THE
UNITED STATES COURT OF APPEALS
FOR THE FIFTH CIRCUIT

THE JOHN G. AND MARIE STELLA KENEDY MEMORIAL FOUNDATION,

Plaintiff-Appellant,

v.

GARRY MAURO, COMMISSIONER OF THE GENERAL LAND OFFICE, AND THE STATE OF TEXAS,

Defendants-Appellees.

ON APPEAL FROM THE UNITED STATES DISTRICT COURT FOR THE SOUTHERN DISTRICT OF TEXAS

POST-SUBMISSION BRIEF OF APPELLANT THE JOHN G. AND MARIE STELLA KENEDY MEMORIAL FOUNDATION

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* * *

TO THE HONORABLE COURT OF APPEALS

Appellant, The John G. and Marie Stella Kenedy Memorial Foundation (the "Foundation"), submits this post-submission brief in accordance with the court's request at oral argument.

During oral argument in the cause on September 9, 1993, this Court asked the parties to address three issues: (1) the applicability to the instant case of this Court's treatment of the *Ex parte Young* doctrine in *Hirtz v. State of Texas*, 974 F.2d 663 (5th Cir. 1992), dealing with the Texas Open Beaches Act; (2) the events in and status of the state court lawsuit that involved the state law claims remanded to state court by the United States District court, and the implications for the Foundation's federal

claims at issue here; and (3) this Court's ability to order a remand of the Foundation's federal claims, if reinstated, under 28 U.S.C. § 1441(c), with particular reference to several decisions cited by the Court.

The Foundation will first briefly summarize the federal and state law claims it has asserted in this litigation. Next, the three issues outlined by the court will be addressed.

* * *

B. RESPONSE TO COURT'S INQUIRIES: THE FOUNDATION ASSERTED VALID FEDERAL CLAIMS AND THOSE CLAIMS SHOULD NOW BE REMANDED TO STATE COURT.

* * *

2. The Disposition of the State Law Claims in State Court, if Anything, Confirms the Availability of the Federal Claims.

In January 1990, the Foundation initiated this suit in state court, where all the state and federal claims could be considered together. Defendants removed this cause to federal court, where it remained for almost three years. The Foundation began discovery in federal court and assumed that, since Defendants had sought this forum and had not urged Eleventh Amendment immunity, all of the claims could be adjudicated together there. Even Defendants' motion for summary judgment, which eventually led to the order of dismissal, did not assert Eleventh Amendment immunity except as to the *Ex parte*

Young claim against Mauro (R. 773-774), which the Eleventh Amendment does not bar. Only later did Defendants assert the Eleventh Amendment as a bar to all claims. (R. 331,145).

When the district court remanded the state law claims to state court in October 1992, the Foundation knew there was no basis for challenging the remand on appeal. Defendants do not contend that any such basis exists.

Since the Foundation has been attempting for many years to obtain redress, during which time Defendants have continued to derive all revenue from the disputed land, and because the Foundation knew Defendants would contend that even the state law claims were barred by sovereign immunity, the Foundation decided to try to prosecute the state court suit. The Foundation's fears about Defendants' intent to block even the state court claims proved correct, as the state law claims recently have been dismissed on Defendants' plea of sovereign immunity.

(a) *Repleading of federal claims in state court.* This Court inquired at oral argument whether the Foundation considered reasserting the federal claims in state court, since the Eleventh Amendment obviously does not operate there. Indeed, the Foundation did consider that avenue, but was concerned about two possible actions: either Defendants would merely remove the suit once more, or, more likely, they would contend that the United States District Court's order of dismissal barred the reassertion of those claims.

The Foundation amended its state court pleading and made reference to the federal claims as a means for preserving the possible availability of those claims, but acknowledged that they had been dismissed by the United States District Court and that the dismissal was being challenged on appeal. (See Tab 5, p. 2 n. 1 in the compilation of state court pleadings and orders submitted with this brief for the Court's use). Even this neutral reference to the status of the federal claims, however, was objected to by Defendants: "The federal courts have exclusive jurisdiction of these federal claims and plaintiff is barred from pursuing these claims in the state courts." (Tab 11, p. 2, ¶ C). In its July 22, 1993 order dismissing the state court suit, the state district court also sustained Defendants' objection to the Foundation's reference to the federal claims. (Tab 15).

(b) *Defendants' effort to abate state court suit.* On February 1, 1993, Defendants moved to abate the state court proceedings pending a resolution of the instant appeal. (Tab 1, p. 3). The Foundation opposed this motion, for the reasons stated above. (Tab 8). By order signed April 6, 1993, the state district court denied Defendants' motion to abate. (Tab 10).

(c) *Defendants' motion to transfer venue and contention about the availability of declaratory relief.* In a February 1, 1993 motion, Defendants sought a transfer of venue for adjudication of the state law claims from Kenedy County, where the disputed land is located, to Travis County. (Tab 1, p. 1). Defendants first contended that the transfer of venue was mandatory, but that the doctrine of sovereign immunity still barred the Foundation's claims. (Tab 4, pp. 2-3). Apparently recognizing the lack of logic in that

position, Defendants then filed another brief raising, *for the first time ever*, the argument that the Foundation could obtain declaratory relief against the State. (Tab 7, p. 2).[4]

The Foundation responded by demonstrating that the statute cited by Defendants does not authorize suit by the Foundation and does not govern this dispute. (Tabs 3 and 6). (See the Texas authorities cited later by Defendants, mandating strict and narrow construction of Texas statutes waiving sovereign immunity, which were used by Defendants to argue immunity from the state law constitutional claims, Tab 12, pp. 1-2, for which legislative permission is not required.). The state district court agreed with the Foundation, and, after a hearing on March 29, 1993, denied Defendants' motion to transfer venue by order dated April 6, 1993. (Tab 9). After dismissal of the suit, in its denial of the Foundation's motion for reconsideration the state district court again reiterated that the statute cited by Defendants does not govern this dispute. (Tab 17).

(d) *The sustaining of Defendants' sovereign immunity contention.* In their answer, Defendants asserted "pleas to the jurisdiction" and "special exceptions" which contended that the Foundation's state law claim against Mauro and its state law taking claim against the state are

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[4] At about the same time as Defendants made their novel assertion in state court, they made a similar contention for the first time on appeal in this cause. (Brief of Appellees, p. 20). Defendants always had contended previously, and they represented to the United States District Court, that, without special legislative consent, the Foundation has *no recourse whatever*. (VI Tr. 19-21, 27).

barred by the doctrine of sovereign immunity. (Tab 11, pp. 1-3). The Foundation opposed Defendants' sovereign immunity contentions, relying, for example, on *State v. Lain* and *Steele v. City of Houston*, quoted on page 3. (Tab 14, pp. 2-3). The state district court heard arguments on the pleas to the jurisdiction and special exceptions on June 11, 1993. On July 22, 1993, the state district court signed an order sustaining the special exceptions and pleas to the jurisdiction and dismissing the state court suit. (Tab 15). The Foundation moved for reconsideration of the state district court's order on August 19, 1993. (Tab 16). The state district court denied the motion for reconsideration by order dated September 14, 1993. (Tab 17).

Although the Foundation is in the process of appealing the dismissal of the state court suit and believes the order of dismissal should be reversed, the state court's action highlights the importance of the federal constitutional safeguards relied on by the Foundation. The federal claims were valid and properly pleaded when they were first raised, and the need for their reinstatement has, if anything, been made more imperative as a result of the state court's recent action.

(e) *Interpleader suits.* Two mineral lessees of the state recently have filed interpleader suits in Travis County, interpleading funds due under the leases and acknowledging the dispute between the Foundation and Defendants. (Tabs 18 and 19). The Foundation and Defendants have answered those suits. (Tabs 19 and 21). As stated above, the state district court in Kenedy County has ruled that the statute cited by Defendants, requiring venue in Travis County, does not govern this dispute. Moreover, that statute does *not* allow the full range of relief that is

provided by the state and federal constitutional claims relied upon by the Foundation.

* * *

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NO. 92-7714

IN THE
UNITED STATES COURT OF APPEALS
FOR THE FIFTH CIRCUIT

THE JOHN G. AND MARIE STELLA KENEDY MEMORIAL FOUNDATION,

Plaintiff-Appellant,

v.

GARRY MAURO, COMMISSIONER OF THE GENERAL LAND OFFICE, AND THE STATE OF TEXAS,

Defendants-Appellees.

On Appeal from the United States District Court
for the Southern District of Texas
Corpus Christi Division

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* * *

TO THE HONORABLE COURT OF APPEALS:

Appellees, Garry Mauro, Commissioner of the General Land Office, and the State of Texas ("Defendants"), submit this brief in response to the Post-Submission Brief of Appellant, the John G. and Marie Stella Kenedy Memorial Foundation ("Foundation"). At oral argument, the

Court requested that the parties address the issues listed below.

* * *

ARGUMENT AND AUTHORITIES

* * *

B. The state court proceedings and the state court remedies available to the Foundation compel a determination that the Foundation has stated no federal claims ripe for review.

The Foundation has provided this Court with copies of the pleadings in state court. It omitted the answers filed by the Defendants in the two state court interpleader actions filed in Travis County. Copies of these answers are included in the Supplemental Index attached hereto. A review of these state court actions and the remedies available to the Foundation in state court establishes that, should this Court not be persuaded that *Pennhurst* bars the Foundation's actions, the Foundation's federal claims should nevertheless be dismissed for lack of ripeness.

The Foundation seeks to characterize its claim as one involving a federal constitutional claim that turns on state property law and analogizes its due process claim to inverse condemnation or taking cases. Should this Court be inclined to view the Foundation as having a legitimate due process claim, it is nevertheless premature and not currently maintainable in the federal courts. The Supreme Court's decision in *Williamson Co. Regional Planning*

Comm'n v. Hamilton Bank, 473 U.S. 172, 105 S.Ct. 3108 (1985), establishes that neither a claim of taking of property for public use without compensation nor a claim of deprivation of property without due process of law is ripe for review in the federal courts if state remedies are available. In *Williamson Co.*, the Supreme Court expressly rejected the argument that a Section 1983 claim is an exception to this rule:

> Respondent asserts that it should not be required to seek variances from the regulations because its suit is predicated upon 42 U.S.C. § 1983, and there is no requirement that a plaintiff exhaust administrative remedies before bringing a § 1983 action. The question whether administrative remedies must be exhausted is conceptually distinct, however, from the question whether an administrative action must be final before it is judicially reviewable. (citations omitted).

Williamson Co., 473 U.S. at 192, 105 S. Ct. at 3119.

The Supreme Court in *Williamson Co.* set out an additional reason that a taking claim is not reviewable if state court procedures are available:

> A second reason the taking claim is not yet ripe is that respondent did not seek compensation through the procedures the State has provided for doing so. The Fifth Amendment does not proscribe the taking of property, it proscribes taking without just compensation. Nor does the Fifth Amendment require that just compensation be paid in advance of, or contemporaneously with, the taking; all that is required is that a "reasonable, certain and adequate provision for obtaining compensation" exist at the

> time of the taking. If the government has provided an adequate process for obtaining compensation, and if resort to that process "yield[s] just compensation," then the property owner "has no claim against the Government" for a taking. Thus, we have held that taking claims against the Federal Government are premature until the property owner has availed itself of the process provided by the Tucker Act, 28 U.S.C. § 1491. Similarly, if a State provides an adequate procedure for seeking just compensation, the property owner cannot claim a violation of the Just Compensation Clause until it has used the procedure and been denied just compensation.

Williamson Co., 473 U.S. at 194-5, 105 S. Ct. at 3120-21. (citations omitted).

This Court has applied the principles of *Williamson Co.* in *Samaad v. City of Dallas*, 940 F.2d 925 (5th Cir. 1991), and in *Smith v. City of Brenham*, 865 F.2d 662 (1989). *Samaad* is particularly on point. In *Samaad*, this Court found Texas procedures for remedying an inverse condemnation adequate. 865 F.2d at 935. *Smith* is also supportive of dismissal in this case in that this Court therein ruled that a due process claim under the Fourteenth Amendment was premature. 865 F.2d at 664.

The Foundation may respond to Defendants' unripeness contention by noting that the State has successfully defended against the Foundation's taking claim filed in state court by asserting sovereign immunity. That is true. The State's argument, however, is not that a valid taking claim is without remedy in the state courts. Rather, the State has consistently contended that the Foundation has no taking claim because the Foundation has not properly

brought, nor has it prevailed in, a boundary or title action against the State. Excerpted below is a passage from the State's brief in support of its jurisdictional plea in state court:

> Plaintiff's claims of an unlawful taking are barred for all the reasons set forth above. Such claims are predicated on Plaintiff establishing title to the Disputed Land. Unless and until Plaintiff establishes title to the Disputed Land, or some color of title, no takings claim is stated. Plaintiff clearly cannot bring an action to establish boundary and title without legislative consent and it presents no basis for legislative consent in its First Amended Original Petition. A boundary action is maintainable against the State, but Plaintiff has failed and refused to proceed under the appropriate statutory authority. Plaintiff, as well as any other littoral owner of land abutting coastal public land, has a remedy to resolve a legitimate boundary dispute with the State. Section 33.060 of the Texas Natural Resources Code imposes on the State's School Land Board the right "to locate and have marked on the ground the boundaries separating coastal public land from other land." TEX. NAT. RES. CODE § 33.060. Commissioner Mauro, who is Chairman of that Board, has general authority to implement the Board's decisions on the locations of those boundaries. TEX. NAT. RES. CODE §§ 31.051, 32.014. Under § 33.171 of the Natural Resources Code, a littoral owner whose rights "may be affected by any action of the board under [Chapter 33] may bring suit for a declaratory judgment against the State of Texas in a district court in Travis County to try the issues." TEX. NAT. RES. CODE

> § 33.171. As this Court is well aware, counsel for Plaintiff is on record in this case stating affirmatively that Plaintiff is not proceeding under that statute. Therefore, Plaintiff's claims asserted herein are barred in their entirety.

(Foundation's Index of State Court Pleadings, Tab 12, pp. 4-5).

The Foundation has claimed it has no right to sue under Chapter 33 of the Texas Natural Resources Code. As set out in the above-quoted brief, the statute plainly provides for such right.[2] The authorization to sue in Chapter 33 is very similar to that provided under the Open Beaches Act Section 61.019(a) of the Texas Natural Resources Code provides comparable authorization to sue to littoral owners affected by the Open Beaches Act: "A littoral owner whose rights are determined or affected by this subchapter ['Access to Public Beaches'] may bring suit for a declaratory judgment against the state to try the issue or issues." TEX. NAT. RES. CODE § 61.019(a). See *Hirtz*, 974 F.2d at 666 (recognizing existence of remedy in

---

[2] The Foundation has never attempted to utilize this statutory provision but criticizes Defendants for not raising the existence of the statute sooner (see the Foundation's postsubmission brief at 14). Defendants demur to the suggestion that they had an obligation to provide the Foundation with a road map for its own lawsuit. In any event, such blame casting should not be a concern of this Court. The question of ripeness is a matter of jurisdictional consequence that can be raised at any time. *Samaad*, 940 F.2d at 934 (ripeness held to be a jurisdictional requirement that cannot be waived). *See also Reno v. Catholic Social Services, Inc.*, ___ U.S. ___, 113 S.Ct. 2485, 2495, n.18 (1993) (Court raised ripeness on its own motion).

state court but holding that waiver of sovereign immunity did not authorize suit in federal court).

The State's position that no taking has occurred, however, in no way deprives the Foundation of a forum. The Foundation has vigorously asserted and argued in state court that Article I, § 17 of the Texas Constitution is, in and of itself, a grant of authority to sue for a taking claim. (Foundation's Index of State Court Pleadings, Tab 13, p. 2). The State's position is that no taking can exist unless and until the Foundation effects a legal change in the current boundary location of the Disputed Land.[3] The Foundation has a state forum in which to challenge that position. That Defendants dispute the validity of the Foundation's claims does not deprive the Foundation of access to the state courts, including access to appellate review of the lower court's rulings. Further, the State has expressly acknowledged in the state district courts in both Kenedy and Travis Counties that a party may bring a suit to determine boundary and title to coastal public land against the State of Texas in Travis County. (Foundation's Index of State Court Pleadings, Tab 12, pp. 4-5, State's Supplemental Index of State Court Pleadings, Tab

---

[3] The Foundation's own federal court pleadings implicitly recognize the validity of the State's position:

> This is a suit against Garry Mauro in his official capacity as Commissioner of the General Land Office under 42 U.S.C. § 1983 and the Due Process clause of the Fourteenth Amendment to the United States Constitution and under state law, *for declaratory and injunctive relief to determine boundary and title to certain real property*. (Plaintiff's First Amended Complaint, R IV 602) (emphasis added).

1, p. 2-3, and Tab 2, p. 2-3). Therefore, the Foundation has a procedure through which it may litigate its boundary dispute, should it choose to use it. The availability of these remedies renders unripe any procedural due process, substantive due process, or taking without just compensation claim by the Foundation and, under the Supreme Court's decision in *Williams Co.*, necessitates dismissal of the Foundation's federal claims.

Federal court review is, of course, ultimately still available to the Foundation. Should utilization of the state judicial system result in a judgment in favor of the Defendants, the Foundation would have the right to seek review of the state court rulings on its taking claim through the filing of a petition for certiorari in the Supreme Court. Such a review is, in fact, the normal process through which taking claims against state or local entities are subjected to federal court review. *See, e.g., Lucas v. South Carolina Coastal Council*, ___ U.S.___ 112 S.Ct. 2886 (1992); *Penn Central Transportation Co. v. City of New York*, 438 U.S. 104, 98 S.Ct. 2646 (1978); *Chicago, B. & Q. R. Co. v. City of Chicago*, 166 U.S. 226, 17 S.Ct. 581 (1897).

* * *

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Filed May 5, 1993

NO. 9305265

BRIGHT & COMPANY, Plaintiff, V. GARRY MAURO, Commissioner of The General Land Office, and THE STATE OF TEXAS, and THE JOHN G. AND MARIE STELLA KENEDY MEMORIAL FOUNDATION Defendants.	§ § § § § § § § § § §	IN THE 200 JUDICIAL DISTRICT COURT OF TRAVIS COUNTY, TEXAS

PETITION IN INTERPLEADER AND FOR DECLARATORY RELIEF

TO THE HONORABLE JUDGE OF SAID COURT:

Comes now BRIGHT & COMPANY, A Texas Partnership (hereinafter referred to as "Bright") and files this its Petition in Interpleader and for Declaratory Relief, and would respectfully show unto the Court, as follows:

I.

PARTIES

Bright is a Texas general partnership.

Garry Mauro, Commissioner of the General Land Office of Texas, is an individual and officer of the State of Texas and may be served with process herein by serving him at the Stephen F. Austin Building, 1700 N. Congress, Austin, Texas 78701.

The State of Texas may be served by serving the Honorable Dan Morales, Attorney General of the State of Texas at the Supreme Court Building, Austin, Texas 78701.

The John G. and Marie Stella Kenedy Memorial Foundation (the "Foundation") is a charitable foundation under Texas law, with its principal offices in Corpus Christi, Nueces County, Texas. The Foundation may be served by serving the Most Reverend Rene H. Gracida, President of the Foundation, at 1020 First City Tower II, Corpus Christi, Nueces County, Texas 78478.

Corpus Christi Diocese of the Roman Catholic Church is a charitable institution. The Diocese may be served with process by serving Bill Tagliabue, Property Manager, 1200 Lantana, Corpus Christi, Nueces County, Texas.

(Garry Mauro, as Commissioner of the General Land Office of Texas, the State of Texas, the Foundation and the Diocese are collectively referred to hereinafter as "Defendants.")

II.

JURISDICTION AND VENUE

This Court has jurisdiction over this matter in that the amount in controversy is in excess of $1000, and is a suit for declaratory relief under TEX. CIV. PRAC. & REM. CODE § 37.003.

Sovereign immunity is not applicable to this action. In addition, Texas Natural Resources Code, §§ 33.171 and

33.173 evidence the Legislature's intention to give consent to suits such as this action. *Missouri Pacific R. Co. v. Brownsville Nav. Dist.*, 453 S.W. 2d 812, 813 (Tex. 1970).

Venue is proper in Travis County.

III.

FACTUAL BACKGROUND

On or about October 2, 1990, Garry Mauro, as Commissioner of the General Land Office of the State of Texas, executed Oil and Gas Lease No. M-94218, leasing Tract 331, Laguna Madre, Kenedy County, Texas, containing approximately 220 acres, as shown on the official map of Kenedy County, on file in the General Land Office, Austin, Texas, to Bright. A true and correct copy of said Oil and Gas Lease is attached hereto as Exhibit "A" and made a part hereof for all purposes.

On or about October 2, 1990, Garry Mauro, as Commissioner of the General Land Office of the State of Texas, executed Oil and Gas Lease No. M-94219, leasing Tract 332, Laguna Madre, Kenedy County, Texas, containing approximately 720 acres, as shown on the official map of Kenedy County, on file in the General Land Office, Austin, Texas, to Bright. A true and correct copy of said Oil and Gas Lease is attached hereto as Exhibit "B" and made a part hereof for all purposes.

On or about April 7, 1992, Garry Mauro, as Commissioner of the General Land Office of the State of Texas, executed Oil and Gas Lease No. M-94914, leasing Tract 323, Laguna Madre, Kenedy County, Texas, containing approximately 450 acres, as shown on the official map of

Kenedy County, on file in the General Land Office, Austin, Texas, to Bright. A true and correct copy of said Oil and Gas Lease is attached hereto as Exhibit "C" and made a part hereof for all purposes.

IV.

On or about October 2, 1991, the Foundation executed an Oil and Gas Lease, leasing Tracts 331 and 332, Laguna Madre, Kenedy County, Texas, containing approximately 940 acres, as shown on the official map of Kenedy County, Texas, on file in the General Land Office, Austin, Texas, to Bright. A true and correct copy of said Oil and Gas Lease is attached hereto as Exhibit "D" and made a part hereof for all purposes.

On or about April 7, 1992, the Foundation executed an Oil and Gas Lease, leasing Tract 323, Laguna Madre, Kenedy County, Texas, containing approximately 450 acres, as shown on the official map of Kenedy County, Texas, on file in the General Land Office, Austin, Texas, to Bright. A true and correct copy of said Oil and Gas Lease is attached hereto as Exhibit "E" and made a part hereof for all purposes.

Subsequently, the Foundation assigned the Diocese 15% of the royalty from its Oil and Gas Leases.

V.

In all the Oil and Gas Leases, royalties for oil and gas are to be paid by May 5, 1993 and May 15, 1993 respectively. Each Oil and Gas Lease, Exhibits "A" through "E" herein, has a proportionate reduction clause, which

reduces the undivided interests in the lands conveyed to that interest which the Lessor actually owns, and proportionately reduces Bright's payments called for in each of the Oil and Gas Leases.

VI.

Mauro and the State of Texas, on the one hand, and the Foundation and Diocese, on the other hand, each contend that they each own all of the mineral fee estate underlying the lands leased by Exhibits "A" through "E" herein.

VII.

On or about January 17, 1990, the Foundation commenced litigation against Mauro and the State of Texas in the 105th Judicial District Court of Kenedy County, Texas, in Cause No. 490, wherein the Foundation has contended that it owned all of the minerals which have been leased to Bright & Company by virtue of Exhibits "D" and "E". Mauro and the State of Texas have denied same, and have alleged that the State owns the minerals. Upon information and belief, the issue as to ownership of the Tracts in question is pending before that Court, wherein both sides have filed motions for summary judgment, attempting to dispose of said issues.

VIII.

PLEA OF INTERPLEADER

A dispute has arisen between the Defendants. Each group claims to own all of the undivided interest of the

minerals leased to Bright in the Tracts described in the Oil and Gas Leases. The dispute is whether the tracts are submerged lands owned by the State or uplands owned by the Foundation. Thereby each claims to be entitled to 100% of the royalties to be paid.

IX.

The claims of the Defendants are adverse and conflicting. Bright is unable to decide the validity of either of said claims and Bright is unable to decide whom it should pay.

With respect to future royalties payable under the leases, Bright is in the position of an innocent stakeholder faced with the possibility of double liability and the costs incident thereto.

X.

Bright neither has nor claims any interest in the royalties payable under said Oil and Gas Leases, and has, at all times, been willing to pay the same to such person or persons as are lawfully entitled thereto.

XI.

Bright has in no way colluded with either of the Defendants concerning the matters of this cause; Bright is not in any manner indemnified by either of said Defendants; and Bright has filed this Petition in Interpleader of its free will to avoid double liability and unnecessary suits and the costs incident thereto.

XII.

Bright hereby deposits the sum of $499.95, being the entire royalties due the entire undivided mineral fee ownership of the lands leased by Exhibits "A: through "E,"[1] which is the subject of the conflicting claims with the District Clerk of Travis County upon the filing of this petition. Bright moves the Court to order that said sums be deposited in interest bearing accounts, including, but not limited to, certificates of deposit of lengths not to exceed six months. Bright intends to deposit all future royalties which would be payable under Exhibits "A" through "E" herein with the Clerk of this Court at such times as such obligations become due and owing.

XIII.

Bright has employed the undersigned counsel to institute this petition for interpleader and to prosecute it to an end and has agreed to pay for said services, reasonable attorney's fees as the Court shall allow.

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[1] Bright's deposit of royalty, and its future deposits of royalty, are calculated based on the royalties due under the leases without any deduction of severance taxes. In the event that the State of Texas is determined to be the owner of the mineral fee estate, then no severance taxes are due from the deposits and the State of Texas would be entitled to the entirety of the royalty award. In the event the Foundation and Diocese are determined to be the owners of the mineral fee estate, a sum for severance taxes would need to be deducted from the award and paid over to the Comptroller.

XIV.

DECLARATORY RELIEF

Pursuant to TEX. CIV. PRAC. & REM. CODE § 37.004 (a), Bright, being a person interested under the Oil and Gas Leases, and Bright's rights, status and other legal relations being affected by the Oil and Gas Leases, seeks determination of questions of construction arising under the Oil and Gas Leases, and Section 52.028 of the Texas Natural Resources Code and to obtain a declaration of rights, status or other legal relations thereunder.

Bright seeks declaratory relief with respect to a construction of the Oil and Gas Leases, Exhibits "A" through "E" herein, as to the ownership of the mineral interests of the Defendants and the application of the proportionate reduction clauses therein, respecting the proportionate interests in delay rentals and royalties which may be due to Mauro and the State of Texas under Exhibits "A" through "C" and due the Foundation under Exhibits "D" and "E."

Pursuant to TEX. CIV. PRAC. & REM. CODE § 37.004(b), a contract may be construed either before or after there has been a breach.

XV.

All persons who have or claim any interests that would be affected by the declaration are made parties herein.

XVI.

Bright further seeks declaratory relief as to the proper construction of TEX. NAT. RES. CODE § 52.028. TEX. NAT. RES. CODE 52.028 provides:

> "(a) If an oil and gas lease issued by the commissioner is involved in litigation relating to its validity or to the authority of the commissioner to lease the land, *the primary term of the lease shall be suspended and all obligations imposed by the lease shall be set aside during the period of the litigation.*
>
> . . . (c) *The lessee shall pay all delay rentals and any royalties that accrue during the period of litigation in same manner as they are to be paid under the lease during the term.* If the delay rentals are not paid as the lease requires, the lease shall not automatically terminate; however, the delay rentals continue to be an obligation and debt owned by the lessee. The delay rentals paid during the period of litigation shall be held and returned to the lessee if the state is unsuccessful in the litigation." (Emphasis added).

As noted hereinabove, under § 52.028, the aforesaid provisions are ambiguous. While subpart (a) refers to the primary term of the lease being suspended and all obligations imposed by the lease set aside during the period of the litigation, subpart (c) provides that the failure to pay delay rentals would not cause the lease to automatically terminate, but continue to be an obligation. By implication, subpart (c) may be improperly construed to mean that payment of royalties during said period of time may result in the automatic termination of the lease, whereas subpart (a) provides that all obligations imposed by the lease are set aside during the period of litigation. Further,

subpart (c) provides only that delay rentals would be returned if the State was unsuccessful in litigation, whereas, royalties paid under said provision by implication would not have to be repaid. Bright seeks a declaration construing Section 52.028, subparts (a) and (c), so as to clarify the patent and latent ambiguities in the statute by reason of the interplay of the two subsections and that payment through interpleader into the registry of this Court is not in violation of Section 52.028 or result in termination of the oil and gas leases (Exhibits A through C).

XVII.

Bright moves the Court to award costs and reasonable and necessary attorney's fees as are equitable and just to Bright in prosecuting this declaratory relief.

XVIII.

Bright prays for further relief under TEX. CIV. PRAC. & REM. CODE, § 37.001 that the Court order that until this Court determines the proportionate interest of Mauro and the State of Texas on the one hand, and the Foundation on the other hand, in the minerals subject to the Oil and Gas Leases, Exhibits "A" through "E" herein, that the obligations of Bright under all said leases be suspended, until final determination of said issues herein, those royalties and other payments which are otherwise due and payable to Mauro and the State of Texas on the one hand, and the Foundation on the other hand, under their respective Oil and Gas Leases (Exhibits "A" through "E") and further moves the Court to give reasonable notice to

Defendants by requiring such Defendants to show cause why such relief should not be granted forthwith.

WHEREFORE, PREMISES CONSIDERED, Bright requests that Defendants be cited to appear and answer herein, interpleading their conflicting claims to the delay rentals and royalty payments in order to settle their respective rights thereto, and on final trial hereof, that Bright have judgment for the following relief:

(1) That Bright be released and discharged from all liability to Defendants or either of them on account of, or in any way arising out of, the payment of royalties into the Registry of the Court, in lieu of payments made pursuant to the terms and provisions of the respective Oil and Gas Leases;

(2) That the District Clerk be ordered to place those disputed sums which Plaintiff delivers to the Registry of the Court into interest bearing accounts, including, but not limited to certificates of deposit with terms of six months or less;

(3) That Bright have and recover a reasonable fee for the services of their attorneys, together with all costs of court and expenses incurred by Bright in this behalf;

(4) That Bright obtain declaratory relief as to the respective ownership interests of Mauro and the State of Texas on the one hand, and the Foundation, on the other hand, in the minerals described in the Oil and Gas Leases, Exhibits "A" through "E" herein, declaring the undivided percentage of delay rentals which are payable to Mauro and the State of Texas, on the one hand, under Exhibits "A" through "C" and the percentage of delay rentals and

royalties payable to the Foundation under Exhibits "E" and "F," pursuant to the proportionate reduction clauses contained in all said Oil and Gas Leases;

(5) That Bright obtain declaratory relief as to the proper construction of TEX. NAT. RES. CODE § 52.028 (a) and (c), as set forth hereinabove;

(6) That Bright obtain supplemental relief under Section 37.011, that the rights and remedies of Mauro and the State of Texas on the one hand, and the Foundation, on the other hand, under the Oil and Gas Leases, Exhibits "A" through "E," with respect to payments, including royalties thereunder, be suspended prior to a court's determination of the respective ownership interests of those parties in the minerals in the Tracts described in Exhibits "A" through "E," conditioned upon Bright timely paying into the registry of the Court the delay rentals and royalties under the Oil and Gas Leases which would represent payments based on all of the undivided interest in minerals in the Tracts, but no greater percentage;

(7) Bright recover reasonable attorney's fees and costs pursuant to TEX. CIV. PRAC. & REM CODE § 37.009; and

(8) Such other and further relief, both general and special, at law or in equity, to which Bright may show itself justly entitled.

Respectfully submitted,

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BY: /s/ F. Franklin Honea
F. Franklin Honea
State Bar No. 09934300
Robert B. Payne, Jr.
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ATTORNEYS FOR BRIGHT & CO.

Filed August 11, 1993

NO. 9309578

EXXON CORPORATION, Plaintiff, V. GARRY MAURO, Commissioner of the General Land Office, THE STATE OF TEXAS, THE KENEDY MEMORIAL FOUNDATION, and THE CORPUS CHRISTI DIOCESE OF THE ROMAN CATHOLIC CHURCH, Defendants.	§ § § § § § § § § § § § § §	IN THE DISTRICT COURT TRAVIS COUNTY, TEXAS 353 JUDICIAL DISTRICT

PETITION IN INTERPLEADER AND FOR DECLARATORY RELIEF

I.

PARTIES

1.1 Exxon Corporation ("Exxon") is a foreign corporation organized and existing under the laws of the state of New Jersey. Exxon has its principal place of business in Dallas County, Texas.

1.2 Garry Mauro, Commission of the General Land Office of Texas ("Mauro"), is an officer of the State of Texas and may be served with process herein by serving him at the Stephen F. Austin Building, 1700 N. Congress, Austin, Texas 78701.

1.3 The State of Texas (the "State") may be served by serving the Honorable Dan Morales, Attorney General

of the State of Texas, at the Supreme Court Building, Austin, Texas 78701.

1.4 The John G. and Marie Stella Kenedy Memorial Foundation (the "Foundation") is a charitable foundation existing under the laws of the State of Texas with its principal offices in Corpus Christi, Nueces County, Texas. The Foundation may be served by serving the Most Reverend Rene H. Gracida, President of the Foundation, 1020 First City Tower II, Corpus Christi, Nueces County, Texas.

1.5 The Corpus Christi Diocese of the Roman Catholic Church (the "Diocese") is a charitable institution. The Diocese may be served with process by serving Bill Tagliabue, Property Manager, 1200 Lantana, Corpus Christi, Nueces County, Texas.

II.

VENUE

2.1 Venue is proper as to the State and Mauro in Travis County pursuant to Section 33.171 and Section 33.172(3) of the Texas Natural Resources Code. Alternatively, venue is proper in Travis County under Section 15.001 of the Texas Civil Practices and Remedies Code inasmuch as Travis County is the county of residence for the State and Mauro.

2.2 Venue is proper as to the Foundation and Diocese in Travis County pursuant to Section 15.061 of the Texas Civil Practice and Remedies Code.

III.

JURISDICTION

3.1 Section 33.171 of the Texas Natural Resources Code waives the sovereign immunity of the State and Mauro.

IV.

STATEMENT OF FACTS

4.1 Both the State and the Foundation claim title to certain coastal lands known as the "mud flats" along the Laguna Madre in Kenedy County, Texas. Exxon desired to explore for oil and gas under the mud flats. Both the State and the Foundation claimed title to the minerals under the mud flats and both were willing to grant leases to Exxon. In view of the conflicting claims to the minerals under the mud flats, Exxon obtained leases from both the State and the Foundation.

4.2 The State has taken the position that the mud flats are coastal public lands, a position disputed by the Foundation. Exxon, by reason of its leases from the State and the Foundation, owns minerals under the mud flats and, by reason of other leases with the Foundation, owns mineral under land bordered by or contiguous to the mud flats.

4.3 On or about April 2, 1991, Garry Mauro, as Commissioner of the General Land Office of the State of Texas, executed Oil and Gas Lease No. M-94474, covering Tract No. 286, Laguna Madre, Kenedy County, Texas, containing approximately 370 acres, as shown on the official map of Laguna Madre on file in the General Land

Office, Austin, Texas, to Exxon. A true and correct copy of the Oil and Gas Lease is attached hereto as Exhibit "A".

4.4 On or about April 2, 1991, Garry Mauro, as Commissioner of the General Land Office of the State of Texas, executed Oil and Gas Lease No. M-94475, covering Tract No. 287, Laguna Madre, Kenedy County, Texas, containing approximately 680 acres, as shown on the official map of Laguna Madre on file in the General Land Office, Austin, Texas, to Exxon. A true and correct copy of the Oil and Gas Lease is attached hereto as Exhibit "B".

4.5 On or about April 2, 1991, Garry Mauro, as Commissioner of the General Land Office of the State of Texas, executed Oil and Gas Lease No. M-94478, covering Tract No. 293, Laguna Madre, Kenedy County, Texas, containing 640 acres, as shown on the official map of Laguna Madre on file in the General Land Office, Austin, Texas, to Exxon. A true and correct copy of the Oil and Gas Lease is attached hereto as Exhibit "C".

4.6 On or about April 2, 1991, Garry Mauro, as Commissioner of the General Land Office of the State of Texas, executed Oil and Gas Lease No. M-94479, covering Tract No. 294, Laguna Madre, Kenedy County, Texas, containing 640 acres, as shown on the official map of Laguna Madre on file in the General Land Office, Austin, Texas, to Exxon. A true and correct copy of the Oil and Gas Lease is attached hereto as Exhibit "D".

4.7 On or about April 2, 1991, Garry Mauro, as Commissioner of the General Land Office of the State of Texas, executed Oil and Gas Lease No. M-94481, covering Tract No. 304, Laguna Madre, Kenedy County, Texas, containing 640 acres, as shown on the official map of

Laguna Madre on file in the General Land Office, Austin, Texas, to Exxon. A true and correct copy of the Oil and Gas Lease is attached hereto as Exhibit "E".

4.8 On or about August 31, 1991, the Foundation executed an Oil and Gas Lease covering Tracts 286, 287, 293, 294 and 304, Laguna Madre, Kenedy County, Texas, as shown on the official map of Kenedy County, Texas, on file in the General Land Office, Austin, Texas, to Exxon. A true and correct copy of the oil and Gas Lease is attached hereto as Exhibit "F".

4.9 The Foundation, Mauro and the State are currently involved in litigation over ownership of the mineral estate of the mud flats. The lawsuit is styled *The John G. and Marie Stella Kenedy Memorial Foundation v. Garry Mauro, Commission of the General Land Office and the State of Texas*, Cause No. 490, in the District Court of Kenedy County, Texas, 105th Judicial District (the "Mud Flats Lawsuit"). On information and belief, the Kenedy County court has entered an order that it lacks jurisdiction in the Mud Flats Lawsuit. Also on information and belief, the order will likely be appealed. Tracts 286, 287, 293, 294 and 304 are part of the area where the ownership is in dispute.

4.10 In May of 1993, a productive well was drilled on Tract No. 286. Pursuant to the terms of the foregoing leases, Exxon is obligated to pay royalties on production from that well. Because of the title dispute between the State and the Foundation, however, Exxon is uncertain under which lease to pay – that granted by the State or that granted by the Foundation. The State has threatened to invoke the forfeiture provision of its lease should

Exxon not pay royalties directly to the State or deposit them with the Court in an interpleader action.

4.11 In the future, Exxon may drill productive wells on one or more of the other tracts to which both the State and the Foundation claim title and which both have leased to Exxon. Until title to the disputed mud flats is resolved, Exxon will not know to whom royalties which may accrue in the future or other payments which may become due under the leases should be paid.

V.

INTERPLEADER

5.1 The State of Texas and the Foundation each claim to be the owner of the disputed tracts and the delay rentals and royalties accruing under leases covering the same land. The Diocese also asserts an ownership interest in the disputed royalties.

5.2 These claims are adverse and conflicting. Exxon is unable to decide the validity of any of the claims and is unable to decide whom it should pay. With respect to the money in its possession, Exxon is in the position of an innocent stakeholder facing the possibility of multiple liability and costs incident thereto.

5.3 Exxon neither has nor claims any interest in the royalties which the State, the Foundation and the Diocese claim. Until final resolution of the title dispute between the State and the Foundation over the mud flats, Exxon will not know which of its leases are enforceable.

5.4 Exxon has not colluded with any of the parties concerning the matters of this case. Exxon has filed this

petition in interpleader of its own free will to avoid multiple liability and unnecessary suits and costs incident thereto.

5.5 Exxon has deposited $24,973.04 with the District Clerk, representing the disputed royalty proceeds accrued as of the date of the filing hereof. Exxon will deposit with the District Clerk all future delay rentals and royalties which become due and payable under the leases covering Tract No. 286 until further order or final judgment of the Court. Exxon requests an order permitting Exxon to deposit into the Court Registry all future delay rentals, royalties or other sums due under any of the leases in connection with future operations, if any, conducted by Exxon on any other disputed tract within the mud flats. These funds shall constitute the Fund.

5.6 Exxon request that the State, Mauro, the Foundation and the Diocese interplead any and all claims which each may have against the Fund. Exxon requests that it be discharged from further liability under the terms of the aforesaid leases with respect to all such payments made by Exxon into the Fund.

5.7 Exxon has employed legal counsel to institute the petition for interpleader and is entitled to reasonable attorneys' fees as the Court shall allow.

VI.

DECLARATORY RELIEF

6.1 As contemplated by Sections 33.171 and 33.172 of the Texas Natural Resources Code, Exxon requests a

determination of title to land claimed by the State to be coastal public land.

6.2 With respect to the Foundation and the Diocese, Exxon is entitled to declaratory relief under the Uniform Declaratory Judgments Act, Section 37.001 et seq. of the Texas Civil Practices and Remedies Code.

WHEREFORE, PREMISES CONSIDERED, Exxon requests that the defendants be cited to appear and interplead their right, title and claim to the Fund in order to settle all claims to royalties, delay rentals or other payments due under the terms of any of the leases described herein. Exxon further requests the following relief:

1. that with respect to deposits made by Exxon into the Fund, Exxon be discharged from all further liability to any defendant for royalties, delay rentals or other sums due under the terms of the leases;

2. that the Fund be maintained in interest bearing accounts, including, but not limited to, certificates of deposit;

3. that Exxon recover reasonable attorneys' fees and costs; and

4. that Exxon have such other and further relief, including declaratory, to which Exxon may show itself entitled.

Respectfully submitted,

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ATTORNEY FOR EXXON CORPORATION

Filed July 20, 1994

NO. 9309578

BRIGHT & COMPANY, Plaintiff, vs. GARRY MAURO, COMMISSIONER OF THE GENERAL LAND OFFICE, THE STATE OF TEXAS, THE JOHN G. AND MARIE STELLA KENEDY MEMORIAL FOUNDATION, and THE CORPUS CHRISTI DIOCESE OF THE ROMAN CATHOLIC CHURCH, Defendants.	§	IN THE DISTRICT COURT TRAVIS COUNTY, TEXAS 200TH JUDICIAL DISTRICT

FIRST AMENDED ANSWER AND CROSS-CLAIM OF DEFENDANT, THE JOHN G. AND MARIE STELLA KENEDY MEMORIAL FOUNDATION

TO THE HONORABLE JUDGE OF THIS COURT:

The John G. and Marie Stella Kenedy Memorial Foundation ("the Foundation") files this first amended answer and cross-claim.

I.

ADMISSIONS AND GENERAL DENIAL

1.1 The Foundation admits the allegations in paragraph X of the Petition, insofar as Plaintiff alleges that it

neither has nor claims any interest in the royalties or delay rentals payable under the subject oil and gas leases. The Foundation further admits that it has and does make a claim to the subject funds, as alleged in paragraph VIII of the Petition. The Foundation hereby exercises its right under Rule 92 to generally deny each and every other allegation contained in the Petition and respectfully requests that Plaintiff be required to prove the charges and allegations against the Foundation by a preponderance of the evidence.

II.

PLAINTIFF IS NOT AN INNOCENT STAKEHOLDER

2.1 The Foundation specifically denies the allegation in paragraph IX of the Petition that Plaintiff is in the position of an innocent stakeholder. The Foundation therefore denies that Plaintiff is entitled to recover any attorney's fees or costs.

III.

OWNERSHIP OF FUNDS

3.1 The Foundation further alleges that it is entitled to recover of and from Plaintiff and Defendants Garry Mauro, Commissioner of the General Land Office, and the State of Texas and be awarded all disputed sums or funds which have been or may be deposited by Plaintiff into the registry of this Court, together with interest, as allowed by law, for the following reasons.

3.2 On or about October 2, 1991, the Foundation executed an oil and gas lease in favor of Plaintiff, leasing

tracts 331 and 332, Laguna Madre, Kenedy County, Texas, containing approximately 940 acres, as shown on the official map of Kenedy County, Texas, on file in the General Land Office, Austin, Texas. A true and correct copy of that oil and gas lease is attached to the Petition as Exhibit "D," incorporated therein by reference, and likewise incorporated in this pleading by reference.

3.3 On or about April 7, 1992, the Foundation executed an oil and gas lease in favor of Plaintiff, leasing tract 323, Laguna Madre, Kenedy County, Texas, containing approximately 450 acres, as shown on the official map of Kenedy County, Texas, on file in the General Land Office, Austin, Texas. A true and correct copy of that oil and gas lease is attached to the Petition as Exhibit "E," incorporated therein by reference, and likewise incorporated in this pleading by reference.

3.4 The approximately 1,390 acres covered by these two oil and gas leases are owned in fee simple by the Foundation as a part of the original Spanish and Mexican Grants, La Barreta and Las Motas de la Barreta, which are owned in fee simple by the Foundation. Therefore, the Foundation owns and is entitled to receive any and all royalties, delay rentals and any other lease benefits which are due and payable under the oil and gas leases between the Foundation and Plaintiff. The Foundation therefore asserts its claim to all disputed sums or funds which have been or may be deposited by Plaintiff into the registry of this Court, together with interest, as allowed by law.

IV.

CROSS-ACTION

4.1 This is a suit against the State of Texas ("State" or "Cross-Defendant") under the Texas Natural Resources Code §§ 33.171-.172 and the Texas Uniform Declaratory Judgments Act, Chapter 37 of the Civil Practice & Remedies Code, to determine boundary and title to certain real property, and under the Fifth and Fourteenth Amendments to the United States Constitution for the inverse condemnation, taking and damaging of the Foundation's real property without just compensation.

V.

PARTIES

5.1 *Cross-Claimant.* The Cross-Claimant is The John G. and Marie Stella Kenedy Memorial Foundation, a charitable foundation with its principal office in Corpus Christi, Nueces County, Texas.

5.2 *Cross-Defendant.* The Cross-Defendant is the State of Texas. Cross-Defendant State has previously filed an answer and has thus already appeared in this action.

VI.

ALLEGATIONS ESTABLISHING CAUSES OF ACTION

6.1 Cross-Defendant State refuses to recognize, and in fact is unable to identify, the proper location of the boundary between the Foundation's property and state-owned submerged land or coastal public land in Kenedy County, Texas and the ownership of a certain tract of

land, which is referred to in this cross-action as the "Disputed Land." The Disputed Land is a part of the Kenedy Ranch owned by the Foundation. The Disputed Land is described by metes and bounds in the legal description appended as Exhibit 1 and is depicted on the map appended as Exhibit 2, both of which exhibits are incorporated by reference in this cross-action. Cross-Defendant State has asserted as the boundary of the Foundation's property a line contiguous with the western boundary of the Disputed Land (which boundary is hereafter referred to as "the State's line").

6.2 The Foundation's claim concerning the eastern boundary of the Disputed Land and concerning its ownership of the Disputed Land, as set forth in the preceding paragraph and subsequent paragraphs, is expressly made subject to that portion of an easement in the United States of America in the surface estate that lies to the east of the existing right-of-way line consisting of approximately two hundred (200) acres of land, for the purpose of maintaining the adjacent Intracoastal Canal. The United States' surface easement is more particularly described in an instrument entitled *Spoil Disposal and Right-of-Way Easement Deed* granted by the Arroyo Colorado Navigation District to the United States on August 21, 1947 and filed of record at Volume 5, pages 233-235 of the Deed Records in Kenedy County, Texas.

6.3 The Foundation has derived its ownership of the Disputed Land from original Spanish and Mexican grants, La Barreta and Las Motas de La Barreta, which are commonly known as the Big Barreta and the Little Barreta, respectively. These grants provide for a riparian or littoral boundary, the Laguna Madre, as the eastern

boundary for those grants. Thus, the Foundation is a "littoral owner" under Tex. Nat. Res. Code § 33.004(12). In 1958, the Supreme Court of Texas more specifically defined the boundary of riparian lands washed by the tides as the vertical elevation of mean higher high water. *Luttes v. State*, 159 Tex. 500, 324 S.W.2d 167, at 187, 191 (1958).

6.4 Cross-Defendant State does not contest the Foundation's ownership of the land within the Big Barreta and Little Barreta grants lying to the west of the Disputed Land. However, Cross-Defendant State has refused to recognize the Foundation's title to any part of the Disputed Land. The Foundation has asserted and continues to assert that, as a riparian or littoral owner, it is entitled to ownership and possession of the land to the intersection of the vertical elevation of mean higher high water of the Laguna Madre with the surface slope of its mainland grants; all of the Disputed Land is above the vertical elevation of mean higher high water, and all of the Disputed Land is owned in fee simple by the Foundation. Therefore, a controversy exists between the Foundation and Cross-Defendant State as to the proper location and description of the current boundary between the Foundation's privately-owned property and property claimed by Cross-Defendant State of Texas.

6.5 The Foundation has caused a study to be made of ground and water conditions in the vicinity of the Disputed Land by M. L. Claunch and William N. Lothrop, Registered Professional Land Surveyors, and has caused a survey to be made on the ground by them. The results of that study and survey verify that all of the Disputed

Land lies above any proper value for the vertical elevation of mean higher high water in the vicinity of the Disputed Land, and thus confirm the validity of the Foundation's claim to the Disputed Land. The Foundation shared the results of the Claunch and Lothrop survey with officers and employees acting under the authority and supervision of Cross-Defendant State and Defendant Mauro. Officers and employees acting under the authority and supervision of Defendant Mauro inspected the Disputed Land with representatives of the Foundation. Nevertheless, Cross-Defendant State refuses to recognize the Foundation's ownership of the Disputed Land.

6.6 Notwithstanding that the Disputed Land is privately-owned upland, lying above the boundary defined by the highest court of the State of Texas, Cross-Defendant State has continued to exercise possession, dominion and control over the Disputed Land to the exclusion of the Foundation. Cross-Defendant State has continued to show the Disputed Land on official state maps as being state-owned submerged tracts and available for lease from the state. The Disputed Land, as described in Exhibit 1, has located within its boundaries all or portions of the following "state lease tracts":

281	295	311	332	351
283	296	316	333	352
284	297	317	334	359
285	301	318	335	360
286	302	319	336	361
287	303	320	343	362
288	304	321	344	363
289	305	322	345	364
290	306	323	346	365
291	307	324	347	366

292	308	325	348	367
293	309	330	349	368
294	310	331	350	377

Cross-Defendant State's claim of ownership, failure to recognize the proper boundary and actions in depicting the Disputed Land as state-owned land constitute a cloud on the Foundation's title to the Disputed Land.

6.7 The denial of the Foundation's rights and the deprivation of its property will continue unless terminated by judgment of this Court. The Foundation requests that this Court determine and declare that all of the Disputed Land is above the vertical elevation of mean higher high water of the Laguna Madre, that the eastern boundary of the Disputed Land constitutes the eastern boundary of the Big Barreta and Little Barreta grants, and that the Foundation is the owner of the Disputed Land. In the alternative, in the event the Court should determine that the Claunch and Lothrop line is not the proper location of the eastern boundary of the Foundation's property, then it should declare and determine an alternative line within the Disputed Land based upon all the evidence adduced, and grant declaratory relief accordingly.

6.8 Cross-Defendant State has taken and/or damaged for or applied to public use all of the mineral and surface estates within the Disputed Land, in violation of the Fifth and Fourteenth Amendments to the United States Constitution. Cross-Defendant State, by and through its agents and other representatives, has physically entered the Disputed Land at different times and has deprived the Foundation of its use of its property and of benefits from the property. Cross-Defendant State

wrongfully has received bonuses, delay rentals, royalties, and other payments as a result of its leasing, in whole or in part, of the "state lease tracts" identified above. The Foundation repeatedly has notified Cross-Defendant State of its claim to the Disputed Land and repeatedly has protested Cross-Defendant State's leasing of the Disputed Land, yet Cross-Defendant State has ignored the Foundation's claim and protests, and has persisted in leasing the Disputed Land and accepting lease payments, refusing even to deposit such payments into the registry of this Court, an escrow account, or other similar account.

6.9 Because the Foundation owns title to the Disputed Land, Cross-Defendant State was and is without any right or authority to use or lease any portion of the Disputed Land or to receive any of the above-mentioned payments. The Foundation has been damaged as a result of the payments to Cross-Defendant State, and Cross-Defendant State has received unauthorized windfalls. Cross-Defendant State therefore should be required to account for any and all payments received by it as a result of the lease or use of any portion of the Disputed Land, and all such payments should be awarded to the Foundation. Alternatively, the Foundation should be awarded the diminution in market value of the Foundation's real property caused by Cross-Defendant State's taking and damaging.

VII.

REQUEST FOR DECLARATORY RELIEF AND ATTORNEYS' FEES

7.1 The Foundation incorporates by reference the allegations contained in the paragraphs above.

7.2 The Foundation petitions the Court pursuant to the Texas Uniform Declaratory Judgments Act, Chapter 37 of the Civil Practice & Remedies Code of Texas, and sections 33.171-.172 of the Texas Natural Resources Code.

7.3 The Foundation respectfully requests that the Court determine and declare the legal rights and relationship, if any, and the interests of the Foundation and Cross-Defendant State in the Disputed Land. The Foundation also requests that the Court declare that Cross-Defendant State's use, possession and occupancy of the Disputed Land violate the United States Constitution, that the Disputed Land lies above the line of mean higher high tide and is therefore privately-owned land belonging to the Foundation, and not coastal public land belonging to Cross-Defendant State, and that Cross-Defendant State has committed a wrongful taking of the Foundation's property entitling the Foundation to an award of just compensation.

7.4 The Foundation has retained the law firm of McGinnis, Lochridge & Kilgore, L.L.P. to represent the Foundation in this action and has agreed to pay the firm costs and reasonable and necessary attorney's fees. An award of reasonable and necessary attorney's fees to the Foundation would be equitable and just and is authorized by section 37.009 of the Texas Civil Practice & Remedies Code.

VIII.

REQUEST FOR JURY TRIAL

8.1 The Foundation hereby demands trial of this entire action by a jury.

PRAYER

WHEREFORE, the Foundation prays:

(a) Upon trial of this cause, that this Court order, adjudge and determine, as against Cross-Defendant State of Texas, that the cloud cast upon the Foundation's title to the Disputed Land be removed and that the Foundation is the owner of the Disputed Land, as described in Exhibit 1, subject to the rights and interest of the United States of America in the surface easement discussed and identified in this cross-action. Such judgment should be based upon the Court's determination that, subject to future changes, the eastern boundary of the Disputed Land as described in Exhibit 1 and shown on Exhibit 2 is the eastern boundary of the grants, commonly known as the Big Barreta and the Little Barreta, owned by the Foundation. Alternatively, if such not be the location of the eastern boundary, then the same should be determined by the Court.

(b) Upon trial of this cause, that this Court order, adjudge and determine, as against Cross-Defendant State of Texas, that since the Foundation owns the Disputed Land in its entirety in fee simple, the Foundation be awarded just compensation for Cross-Defendant State's wrongful taking of the Foundation's property, including

but not limited to an award of all payments made to the State of Texas as a result of Cross-Defendant State's use or lease of all or any portion of the Disputed Land, or, alternatively, the diminution in market value of the Foundation's real property caused by Cross-Defendant State of Texas' taking and damaging.

(c) Upon trial of this cause, that this Court order, adjudge and determine, as against Plaintiff Bright & Company and Defendants Garry Mauro, Commissioner of the General Land Office, and the State of Texas, that Plaintiff and Defendants Garry Mauro, Commissioner of the General Land Office, and the State of Texas take nothing by this suit and the Foundation recover of and from Plaintiff and Defendants Garry Mauro, Commissioner of the General Land Office, and the State of Texas and be awarded all disputed sums or funds which have been or may be deposited by Plaintiff into the registry of this Court, together with interest, as allowed by law.

(d) That the Foundation be awarded all costs and reasonable attorney's fees.

(e) That the Foundation be awarded both pre-judgment and post-judgment interest, as allowed by law.

(f) That the Foundation have such other and further relief, in law or in equity, to which it may show itself entitled.

Respectfully submitted,

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